United Nations

Report of the International Law Commission

Sixtieth session
(5 May-6 June and 7 July-8 August 2008)

General Assembly
Official Records
Sixty-third session
Supplement No. 10 (A/63/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2008*.

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CONTENTS

Chapter	Paragraphs	Page
I. INTRODUCTION	1 - 11	1
A. Membership	2	1
B. Officers and the Enlarged Bureau	3 - 5	2
C. Drafting Committee	6 - 7	3
D. Working Groups	8 - 9	4
E. Secretariat	10	5
F. Agenda	11	5
II. SUMMARY OF THE WORK OF THE COMMISSION AT ITS SIXTIETH SESSION	12 - 25	7
III. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION	26 - 33	11
A. Reservations to treaties	26 - 28	11
B. Responsibility of international organizations	29 - 30	11
C. Protection of persons in the event of disasters	31 - 33	12
IV. SHARED NATURAL RESOURCES	34 - 54	13
A. Introduction	34 - 36	13
B. Consideration of the topic at the present session	37 - 48	14
1. Relationship between the draft articles and other instruments	39 - 45	15
2. Adoption of the draft articles and commentaries thereto	46 - 48	17
C. Recommendation of the Commission	49	18
D. Tribute to the Special Rapporteur, Mr. Chusei Yamada	50 - 52	18

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

E. Draft articles on the law of transboundary aquifers .... 53 - 54 19

1. Text of the draft articles 53 19

2. Text of the draft articles with commentaries thereto 54 27

General commentary 27

Preamble 30

Commentary 31

PART ONE

INTRODUCTION 32

Article 1. Scope 32

Commentary 32

Article 2. Use of terms 34

Commentary 34

PART TWO

GENERAL PRINCIPLES 38

Article 3. Sovereignty of aquifer States 38

Commentary 38

Article 4. Equitable and reasonable utilization 40

Commentary 41

Article 5. Factors relevant to equitable and reasonable utilization 43

Commentary 44

Article 6. Obligation not to cause significant harm 46

Commentary 46

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

Article 7. General obligation to cooperate 48

Commentary 48

Article 8. Regular exchange of data and information 50

Commentary 50

Article 9. Bilateral and regional agreements and arrangements ... 53

Commentary 53

PART THREE

PROTECTION, PRESERVATION AND MANAGEMENT 54

Article 10. Protection and preservation of ecosystems 54

Commentary 55

Article 11. Recharge and discharge zones 56

Commentary 57

Article 12. Prevention, reduction and control of pollution 57

Commentary 58

Article 13. Monitoring 60

Commentary 60

Article 14. Management 63

Commentary 63

Article 15. Planned activities 65

Commentary 66

PART FOUR

MISCELLANEOUS PROVISIONS 68

Article 16. Technical cooperation with developing States 68

Commentary 69

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

Article 17. Emergency situations 72

Commentary 73

Article 18. Protection in time of armed conflict 77

Commentary 77

Article 19. Data and information vital to national defence or security 78

Commentary 78

V. EFFECTS OF ARMED CONFLICTS ON TREATIES .... 55 - 66 80

A. Introduction .... 55 - 57 80

B. Consideration of the topic at the present session .... 58 - 64 81

C. Text of the draft articles on Effects of armed conflicts on treaties adopted by the Commission on first reading .... 65 - 66 82

1. Text of the draft articles 65 82

2. Text of the draft articles with commentaries thereto 66 87

EFFECTS OF ARMED CONFLICTS ON TREATIES 88

Article 1. Scope 88

Commentary 88

Article 2. Use of terms 90

Commentary 90

Article 3. Non-automatic termination or suspension 93

Commentary 93

Article 4. Indicia of susceptibility to termination, withdrawal or suspension of treaties 94

Commentary 95

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

Article 5. Operation of treaties on the basis of implication from their subject matter 95

Commentary 96

Article 6. Conclusion of treaties during armed conflict 124

Commentary 124

Article 7. Express provisions on the operation of treaties 125

Commentary 125

Article 8. Notification of termination, withdrawal or suspension 126

Commentary 126

Article 9. Obligations imposed by international law independently of a treaty 127

Commentary 128

Article 10. Separability of treaty provisions 128

Commentary 129

Article 11. Loss of the right to terminate, withdraw from or suspend the operation of a treaty 129

Commentary 129

Article 12. Resumption of suspended treaties 130

Commentary 130

Article 13. Effect of the exercise of the right to individual or collective self-defence on a treaty 130

Commentary 130

CONTENTS (*continued*)

Chapter		*Paragraphs*	*Page*
Article 14.	Decisions of the Security Council		131
	Commentary		131
Article 15.	Prohibition of benefit to an aggressor State		132
	Commentary		132
Article 16.	Rights and duties arising from the laws of neutrality		133
	Commentary		133
Article 17.	Other cases of termination, withdrawal or suspension		133
	Commentary		133
Article 18.	Revival of treaty relations subsequent to an armed conflict		134
	Commentary		134
Annex			134
VI.	RESERVATIONS TO TREATIES	67 - 124	136
A.	Introduction	67 - 70	136
B.	Consideration of the topic at the present session	71 - 122	137
1.	Introduction by the Special Rapporteur of his thirteenth report	80 - 92	139
2.	Summary of debate	93 - 109	144
(a)	General comments	93 - 94	144
(b)	Specific comments on the draft guidelines	95 - 109	145
3.	Concluding remarks of the Special Rapporteur	110 - 122	148

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission .... 123 - 124 150

1. Text of the draft guidelines 123 150

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its sixtieth session 124 174

2.1.6 [2.1.6, 2.1.8]. Procedure for communication of reservations 174

Commentary 174

2.1.9 Statement of reasons 184

Commentary 184

2.6 Formulation of objections 189

2.6.5 Author 189

Commentary 189

2.6.6 Joint formulation 193

Commentary 193

2.6.7 Written form 195

Commentary 195

2.6.8 Expression of intention to preclude the entry into force of the treaty 197

Commentary 197

2.6.9 Procedure for the formulation of objections 200

Commentary 200

2.6.10 Statement of reasons 203

Commentary 203

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation 206

Commentary 206

2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty 208

Commentary 208

2.6.13 Time period for formulating an objection 213

Commentary 213

2.6.14 Conditional objections 218

Commentary 218

2.6.15 Late objections 221

Commentary 221

2.7 Withdrawal and modification of objections to reservations 225

Commentary 225

2.7.1 Withdrawal of objections to reservations 228

Commentary 228

2.7.2 Form of withdrawal 229

Commentary 230

2.7.3 Formulation and communication of the withdrawal of objections to reservations 230

Commentary 230

CONTENTS (*continued*)

Chapter		*Paragraphs*	*Page*
2.7.4	Effect on reservation of withdrawal of an objection		231
	Commentary		232
2.7.5	Effective date of withdrawal of an objection		233
	Commentary		233
2.7.6	Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation		236
	Commentary		236
2.7.7	Partial withdrawal of an objection		237
	Commentary		237
2.7.8	Effect of a partial withdrawal of an objection		240
	Commentary		240
2.7.9	Widening of the scope of an objection to a reservation		241
	Commentary		241
2.8	Forms of acceptance of reservations		243
	Commentary		243
VII.	RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS	125 - 165	249
A.	Introduction	125 - 126	249
B.	Consideration of the topic at the present session	127 - 163	250
1.	Introduction by the Special Rapporteur of his sixth report	135 - 144	251

CONTENTS (*continued*)

Chapter		*Paragraphs*	*Page*
	2. Summary of the debate	145 - 162	257
	(a) General comments	145 - 147	257
	(b) Countermeasures	148 - 162	257
	(i) General remarks	148 - 153	257
	(ii) Specific comments on the draft articles	154 - 162	259
	3. Concluding remarks of the Special Rapporteur	163	262
	C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission	164 - 165	262
	1. Text of the draft articles	164	262
	2. Text of the draft articles with commentaries thereto adopted by the Commission at its sixtieth session	165	281
	PART THREE		
	THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION		281
	CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION		282
	Article 46. Invocation of responsibility by an injured State or international organization		282
	Commentary		282
	Article 47. Notice of claim by an injured State or international organization		285
	Commentary		285
	Article 48. Admissibility of claims		286
	Commentary		286

CONTENTS (*continued*)

Chapter		*Paragraphs*	*Page*
	Article 49[48]. Loss of the right to invoke responsibility		290
	Commentary		290
	Article 50[49]. Plurality of injured States or international organizations		291
	Commentary		291
	Article 51[50]. Plurality of responsible States or international organizations		292
	Commentary		293
	Article 52[51]. Invocation of responsibility by a State or an international organization other than an injured State or international organization		294
	Commentary		295
	Article 53. Scope of this Part		299
	Commentary		299
VIII.	EXPULSION OF ALIENS	166 - 213	300
	A. Introduction	166 - 169	300
	B. Consideration of the topic at the present session	170 - 213	300
	1. Introduction by the Special Rapporteur of his fourth report	173 - 184	301
	2. Summary of the debate	185 - 206	304
	(a) General comments	185 - 190	304
	(b) The situation of persons having dual or multiple nationality in relation to expulsion	191 - 197	305
	(c) Loss of nationality, denationalization and expulsion	198 - 206	307
	3. Concluding remarks of the Special Rapporteur	207 - 213	309

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
IX. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS	214 - 264	311
A. Introduction	214	311
B. Consideration of the topic at the present session	215 - 264	311
1. Introduction by the Special Rapporteur of his preliminary report	217 - 225	312
2. Summary of the debate	226 - 259	315
(a) A rights-based approach to the topic	227 - 229	316
(b) Scope of the topic	230 - 240	317
(c) Right to humanitarian assistance	241 - 250	320
(d) Sources relevant to the consideration of the topic	251 - 256	323
(e) Future programme of work and final form	257 - 259	324
3. Concluding remarks of the Special Rapporteur	260 - 264	325
X. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION	265 - 311	327
A. Introduction	265	327
B. Consideration of the topic at the present session	266 - 311	327
1. Introduction by the Special Rapporteur of his preliminary report	267 - 277	327
2. Summary of the debate	278 - 299	331
(a) General comments	278 - 280	331
(b) Sources	281	331
(c) Basic concepts	282 - 287	331

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

(d) Persons covered .... 288 - 293 333

(e) The question of possible exceptions to immunity .... 294 - 299 335

3. Concluding remarks of the Special Rapporteur .... 300 - 311 338

XI. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*aut dedere aut judicare*) .... 312 - 332 342

A. Introduction .... 312 - 313 342

B. Consideration of the topic at the present session .... 314 - 332 342

1. Introduction by the Special Rapporteur of his third report .... 316 - 321 342

2. Summary of the debate .... 322 - 328 344

(a) General comments .... 322 - 323 344

(b) Comments on the draft articles proposed by the Special Rapporteur .... 324 - 326 345

(c) Comments on the future work of the Commission on the topic .... 327 - 328 346

3. Concluding remarks of the Special Rapporteur .... 329 - 332 346

XII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .... 333 - 388 348

A. Programme, procedures and working methods of the Commission and its documentation .... 333 - 362 348

1. Commemoration of the sixtieth anniversary of the Commission and meeting with Legal Advisers .... 336 - 340 348

2. Consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels .... 341 - 346 350

3. Relations between the Commission and the Sixth Committee .... 347 - 350 353

4. Working Group on Long-term Programme of Work .... 351 - 352 354

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

5. Inclusion of new topics on the programme of work of the Commission and establishment of study groups .... 353 - 354 355

6. Meeting with Legal Advisers of specialized agencies 355 355

7. Meeting with members of the Appellate Body of the WTO 356 356

8. Financial matters .... 357 - 358 356

(a) Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report 357 356

(b) Honoraria 358 357

9. Documentation and publications .... 359 - 362 357

(a) Processing and issuance of reports of Special Rapporteurs 359 357

(b) Establishment of a trust fund on the backlog relating to the *Yearbook* of the International Law Commission 360 358

(c) Other publications and the assistance of the Codification Division .... 361 - 362 358

B. Date and place of the sixty-first session of the Commission ... 363 359

C. Cooperation with other bodies .... 364 - 371 359

D. Casual vacancy 372 360

E. Representation at the sixty-third session of the General Assembly .... 373 - 374 361

F. International Law Seminar .... 375 - 388 361

Annexes

Annex A. Treaties over time in particular: Subsequent Agreement and Practice 365

Annex B. The Most-Favoured-Nation clause 390

CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its sixtieth session from 5 May to 6 June 2008 and the second part from 7 July to 8 August 2008 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Ian Brownlie, Chairman of the fifty-ninth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Ian Brownlie (United Kingdom)
Mr. Lucius Caflisch (Switzerland)
Mr. Enrique Candioti (Argentina)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Christopher John Robert Dugard (South Africa)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Hussein A. Hassouna (Egypt)
Mr. Mahmoud D. Hmoud (Jordan)
Ms. Marie G. Jacobsson (Sweden)
Mr. Maurice Kamto (Cameroon)
Mr. Fathi Kemicha (Tunisia)
Mr. Roman Anatolyevitch Kolodkin (Russian Federation)
Mr. Donald M. McRae (Canada)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Bernd H. Niehaus (Costa Rica)
Mr. Georg Nolte (Germany)

Mr. Bayo Ojo (Nigeria)
Mr. Alain Pellet (France)
Mr. A. Rohan Perera (Sri Lanka)
Mr. Ernest Petrič (Slovenia)
Mr. Gilberto Vergne Saboia (Brazil)
Mr. Narinder Singh (India)
Mr. Eduardo Valencia-Ospina (Colombia)
Mr. Edmundo Vargas Carreño (Chile)
Mr. Stephen C. Vasciannie (Jamaica)
Mr. Marcelo Vázquez-Bermúdez (Ecuador)
Mr. Amos S. Wako (Kenya)
Mr. Nugroho Wisnumurti (Indonesia)
Ms. Hanqin Xue (China)
Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2956th meeting, on 5 May 2008, the Commission elected the following officers:

Chairman:	Mr. Edmundo Vargas Carreño
First Vice-Chairman:	Mr. Roman A. Kolodkin
Second Vice-Chairman:	Mr. Mahmoud D. Hmoud
Chairman of the Drafting Committee:	Mr. Pedro Comissário Afonso
Rapporteur:	Ms. Paula Escarameia

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. R.A. Kolodkin (Chairman), Mr. I. Brownlie, Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. S. Fomba, Mr. Z. Galicki,

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[1] Mr. E. Candioti, Mr. I. Brownlie, Mr. Z. Galicki, Mr. T.V. Melescanu, Mr. A. Pellet and Mr. C. Yamada.

[2] Mr. I. Brownlie, Mr. G. Gaja, Mr. Z. Galicki, Mr. R.A. Kolodkin, Mr. M. Kamto, Mr. A. Pellet, Mr. E. Valencia-Ospina and Mr. C. Yamada.

Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. D.M. McRae, Mr. B. Niehaus, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vásquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Ms. H. Xue, Mr. C. Yamada and Ms. P. Escarameia (*ex officio*).

C. Drafting Committee

6. At its 2957th, 2965th, 2968th and 2977th meetings, on 6, 21, 29 May and 16 July 2008, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Reservations to treaties: Mr. P. Comissário Afonso (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. E. Candioti, Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. G. Nolte, Mr. B. Ojo, Mr. A.R. Perera, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

(b) Shared natural resources: Mr. P. Comissário Afonso (Chairman), Mr. C. Yamada (Special Rapporteur), Mr. I. Brownlie, Mr. L. Caflisch, Mr. E. Candioti, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. B. Ojo, Mr. G.V. Saboia, Mr. S.C. Vasciannie, Mr. M. Vásquez-Bermúdez, Mr. N. Wisnumurti, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

(c) Responsibility of international organizations: Mr. P. Comissário Afonso (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.J. Dugard, Mr. S. Fomba, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Ms. H. Xue, Mr. C. Yamada and Ms. P. Escarameia (*ex officio*).

(d) Effects of armed conflicts on treaties: Mr. P. Comissário Afonso (Chairman), Mr. I. Brownlie (Special Rapporteur), Mr. L. Caflisch, Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

(e) Expulsion of aliens: Mr. P. Comissário Afonso (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. I. Brownlie, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. M.D. Hmoud, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Ms. H. Xue, Mr. C. Yamada and Ms. P. Escarameia (*ex officio*).

7. The Drafting Committee held a total of 41 meetings on the five topics indicated above.

D. Working Groups

8. At its 2964th, 2965th, 2973rd and 2988th meetings, on 16 and 21 May, 6 June and 31 July, respectively, the Commission also established the following Working Groups:

(a) Working Group on Responsibility of international organizations:[3] Mr. E. Candioti (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. P. Comissário Afonso, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. D.M. McRae, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Ms. H. Xue, Mr. C. Yamada and Ms. Paula Escarameia (*ex officio*).

(b) Working Group on Effects of armed conflicts on treaties. Mr. L. Caflisch (Chairman), Mr. I. Brownlie (Special Rapporteur), Mr. P. Comissário Afonso, Mr. C.J. Dugard, Mr. S. Fomba, Ms. M.G. Jacobsson, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. B. Ojo, Mr. A.R. Perera, Mr. Ernest Petrič, Mr. G.V. Saboia, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

(c) Working Group on Expulsion of aliens:[4] Mr. D.M. McRae (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. S. Fomba, Mr. Z. Galicki, Mr. M.D. Hmoud, Mr. B.H. Niehaus, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

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[3] Membership was announced at the 2967th meeting, on 27 May 2008.

[4] Membership was announced at the 2977th meeting, on 10 July 2008.

(d) The Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Mr. A. Pellet (Chairman), Mr. Z. Galicki (Special Rapporteur).

9. The Working Group on Long-term programme of work for the quinquennium was reconstituted at the current session and was composed of the following members: Mr. E. Candioti (Chairman), Mr. I. Brownlie, Mr. P. Comissário Afonso, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Ms. H. Xue and Ms. P. Escarameia (*ex officio*).

E. Secretariat

10. Mr. Nicolas Michel, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director, served as Deputy Secretary, Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary. Mr. Arnold Pronto, Legal Officer, Mr. Pierre Bodeau-Livinec, Legal Officer, Mr. Santiago Villalpando, Legal Officer, and Mr. Gionata Buzzini, Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

11. At its 2956th meeting, on 5 May 2008, the Commission adopted an agenda for its sixtieth session consisting of the following items:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Responsibility of international organizations.
4. Shared natural resources.
5. Effects of armed conflicts on treaties.

6. Expulsion of aliens.
7. The obligation to extradite or prosecute (*aut dedere aut judicare*).
8. Protection of persons in the event of disasters.
9. Immunity of State officials from foreign criminal jurisdiction.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-first session.
12. Cooperation with other bodies.
13. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS SIXTIETH SESSION

12. Concerning the topic "**Shared natural resources**", the Commission adopted, on second reading, a preamble and a set of 19 draft articles, together with commentaries thereto, on the law of transboundary aquifers and in accordance with article 23 of its statute recommended a two-step approach consisting in the General Assembly (a) taking note of the draft articles to be annexed to its resolution and recommending that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (b) considering, at a later stage, the elaboration of a convention on the basis of the draft articles. Since there would be some time before a decision is made on the second step, the Commission decided to refrain from formulating a draft article on the relationship between these draft articles and other international agreements and also a draft article on the settlement of disputes the formulation of which would become necessary only when the second step would be initiated.

13. In the consideration of the topic at the present session, the Commission had before it the Fifth report of the Special Rapporteur (A/CN.4/591), containing a set of 20 draft articles on the law of transboundary aquifers, together with comments and observations received from Governments on the draft articles adopted on first reading (A/CN.4/595 and Add.1). Having adopted a two-step approach, it was considered premature to address issues relating to relationship with other agreements and dispute settlement (chap. IV).

14. As regards the topic "**Effects of armed conflicts on treaties**", the Commission provisionally adopted, on first reading, a set of 18 draft articles and an annex (containing a list of categories of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict), together with commentaries thereto, on the effects of armed conflicts on treaties and decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General to Governments for comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 2010. The draft articles, which apply to situations where at least one of the parties to a treaty is a party to an armed conflict whether international or

non-international, proceed on the premise of the basic principle of continuity of treaty relations: the outbreak of such armed conflict does not necessarily terminate or suspend the operation of treaties, and draw relevant expository consequences therefrom.

15. In the consideration of the topic at the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/589) dealing with the procedure for the suspension or termination of treaties as a consequence of an armed conflict. The report was considered in the context of the work of the Working Group the Effects of Armed Conflicts on Treaties, which continued its work began in 2007 and the remaining draft articles which it completed were referred to the Drafting Committee (A/CN.4/L.726) (chap. V).

16. Concerning the topic "**Reservations to treaties**", the Commission adopted 23 draft guidelines dealing with formulation and withdrawal of acceptances and objections, as well as the procedure for acceptance of reservations, together with commentaries thereto.

17. In the consideration of these draft guidelines at the present session, the Commission proceeded on the basis of the Note by the Special Rapporteur on a new draft guideline 2.1.9 on statement of reasons of reservations (A/CN.4/586) and draft guidelines contained in the eleventh (A/CN.4/574) and twelfth (A/CN.4/584) reports of the Special Rapporteur which were referred to the Drafting Committee in 2007.

18. The Commission also considered the thirteenth report of the Special Rapporteur (A/CN.4/600) on reactions to interpretative declarations and referred to the Drafting Committee 10 draft guidelines on reactions to interpretative declarations. The main issues in the debate concerned the relation between conditional interpretative declarations and reservations, as well as the effects of silence as a reaction to an interpretative declaration (chap. VI).

19. Concerning the topic "**Responsibility of international organizations**", the Commission provisionally adopted eight draft articles, together with commentaries thereto, dealing with the invocation of the international responsibility of an international organization, and constituting chapter I of Part Three of the draft articles concerning the implementation of the international responsibility of an international organization. It also took note of seven draft articles provisionally adopted by the Drafting Committee, focusing on countermeasures and constituting

chapter II of Part Three of the draft articles concerning the implementation of the international responsibility of an international organization (A/CN.4/L.725/Add.1). These draft articles, together with commentaries thereto, will be considered by the Commission next year.

20. In the consideration of the topic at the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/597), which focused on issues relating to the implementation of the responsibility of international organizations. Following its debate on the report, during which issues concerning countermeasures were prominent, the Commission referred six draft articles on the invocation of responsibility to the Drafting Committee. The Commission also established a Working Group for the purpose of considering the question of countermeasures, as well as the advisability of including in the draft articles a provision relating to admissibility of claims. Upon receipt of reports of the Working Group, the Commission referred to the Drafting Committee, an additional draft article on admissibility of claims; and six draft articles on countermeasures, on the basis of the draft articles submitted by the Special Rapporteur, together with recommendations of the Working Group (chap. VII).

21. In connection with the topic "**Expulsion of aliens**", the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594), dealing with questions relating to the expulsion of dual or multiple nationals, as well as loss of nationality or denationalization in relation to expulsion, prepared in the light of the debate in 2007. Following the debate on the report, the Commission established a Working Group to consider the issues raised by the Special Rapporteur in his report and it determined that there was no need to have separate draft articles on the matter; the necessary clarifications will be made in the commentaries to the relevant draft articles. The seven draft articles referred to the Drafting Committee in 2007 remain in the Drafting Committee until all the draft articles are provisionally adopted (chap. VIII).

22. In relation to the topic "**Protection of persons in the event of disasters**" the Commission held a debate on the basis of the preliminary report of the Special Rapporteur (A/CN.4/598). It also had before it a memorandum of the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3). Among the many issues discussed were the main legal questions to be covered by the topic, including questions concerning the approach to the topic, as well as its scope in terms of the subject matter, personal scope, space and time (chap. IX).

23. As regards the topic "**Immunity of State officials from foreign criminal jurisdiction**" the Commission held a debate on the basis of the preliminary report of the Special Rapporteur (A/CN.4/601). It also had before it a memorandum of the Secretariat (A/CN.4/596). Among the many issues discussed were the main legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of the acts to be covered, as well as whether there are possible exceptions (chap. X).

24. In connection with the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**" the Commission held a debate on the basis of the third report of the Special Rapporteur (A/CN.4/603). It also had before it comments and information received from Governments (A/CN.4/599). Among the issues discussed were the substantive questions related to the customary nature of the obligation, the relation with universal jurisdiction and international courts, as well as procedural aspects to be dealt with in future (chap. XI).

25. The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. XII, sect. A). The Commission is most appreciative of the efforts undertaken during the two-day event organized to commemorate its sixtieth anniversary session (chap. XII, sect. A.1). The Commission pursuant to resolution 62/70 of 6 December 2007 has commented on its current role in promoting the rule of law (chap. XII, sect. A.2). A Working Group on the Long-term programme of work was reconstituted, under the chairmanship of Mr. Enrique Candioti (chap. XII, sect. A.4). The Commission decided to include in its current programme of work two new topics, namely "Treaties over time" on the basis of a revised and updated proposal by Mr. G. Nolte (see annex A) and "The Most-favoured-Nation clause" on the basis of the report of the 2007 Working Group chaired by Mr. D.M. McRae on the subject (see annex B). In this regard, it decided to establish at its session next year two study groups on the two topics (chap. XII, sect. A.4). The Commission decided that its sixty-first session be held in Geneva from 4 May to 5 June and 6 July to 7 August 2009.

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

A. Reservations to treaties

26. Given the dearth of practice with regard to reactions to interpretative declarations and the different opinions of the members of the Commission, the Commission would be grateful if States would kindly respond to the questions below in their concrete practice:

(a) Are there circumstances in which silence in response to an interpretative declaration can be taken to constitute acquiescence in the declaration?

(b) If so, what would those circumstances be (specific examples would be very welcome)?

(c) If silence does not *per se* constitute acquiescence in an interpretative declaration, should it play a part in the legal effects that the declaration may bring about?

27. Taking into account that next year's report will deal with, *inter alia*, the consequences of interpretative declarations, what are the consequences of an interpretative declaration for:

(a) Its author;

(b) A State or international organization which has approved the declaration;

(c) A State or organization which has expressed opposition to the declaration?

28. More generally, what impact do the reactions - whether positive or negative - of other States or international organizations to an interpretative declaration have upon the effects that the declaration may produce (specific examples would be very welcome)?

B. Responsibility of international organizations

29. The Commission would welcome comments and observations from Governments and international organizations on draft articles 46 to 53, dealing with the invocation of the responsibility of an international organization.

30. The Commission would also welcome comments on issues relating to countermeasures against international organizations, taking into account the discussion of these issues, as reflected in Chapter VII.

C. Protection of persons in the event of disasters

31. The Commission would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.

32. The Commission would also welcome information from the United Nations on the basis of the following question:

> How has the United Nations system institutionalized roles and responsibilities, at global and country levels with regard to assistance to affected populations and States in the event of disasters - in the disaster response phase but also in pre- and post-disaster phases - and how does it relate in each of these phases with actors such as States, other intergovernmental organizations, the Red Cross Movement, non-governmental organizations, specialized national response teams, national disaster management authorities and other relevant actors?

33. Information will also be sought from the International Federation of the Red Cross and Red Crescent Societies on the basis of a similar inquiry adjusted as appropriate.

CHAPTER IV

SHARED NATURAL RESOURCES

A. Introduction

34. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur.[5] A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[6] The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.[7]

35. From its fifty-fifth (2003) to its fifty-ninth (2007) sessions, the Commission received and considered four reports from the Special Rapporteur.[8] During this period, the Commission also established four working groups: the first in 2004, chaired by the Special Rapporteur, assisted in furthering the Commission's consideration of the topic and the second in 2005, chaired by Mr. Enrique Candioti, reviewed and revised the 25 draft articles on the law of transboundary aquifers proposed by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1 and Add.1) taking into account the debate in the Commission; the third in 2006, chaired by Mr. Enrique Candioti, completed the review and revision of the draft articles submitted by the Special Rapporteur in his third report, culminating in the completion, on first reading, of the draft articles on the law of transboundary aquifers (2006); the fourth in 2007, chaired by Mr. Enrique Candioti, assisted the Special Rapporteur in considering a future work programme, in particular the relationship between aquifers and any future consideration of oil and gas, consequently agreeing with the proposal of the Special Rapporteur that the Commission should

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[5] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 518-519. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work. See also Assembly resolution 55/152 of 12 December 2000.

[6] *Ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.

[7] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 529.

[8] A/CN.4/533 and Add.1 (first report), A/CN.4/539 and Add.1 (second report), A/CN.4/551 and Corr.1 and Add.1 (third report) and A/CN.4/580 (fourth report).

proceed to a second reading of the draft articles on the law of transboundary aquifers in 2008 and treat that subject independently of any future work by the Commission on oil and gas.

36. The Commission, at its fifty-eighth session (2006), adopted on first reading draft articles on the law of transboundary aquifers consisting of 19 draft articles,[9] together with commentaries thereto,[10] and decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008.[11]

B. Consideration of the topic at the present session

37. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/591), containing a set of 20 draft articles on the law of transboundary aquifers for the consideration of the Commission on second reading. The Commission also had before it the comments and observations received from Governments on the draft articles adopted on first reading (A/CN.4/595 and Add.1).[12] The Special Rapporteur introduced the fifth report at the 2956th meeting, on 5 May 2008 and the Commission considered it at its 2957th, 2958th and 2959th meetings, on 6, 7 and 8 May 2008, respectively. The debate focused primarily on the substantive consideration of the draft articles proposed by the Special Rapporteur, as well as on the form of the draft articles, taking into account draft article 20 on the relation to other conventions and international agreements proposed by the Special Rapporteur, as well as his recommendation that a two-step approach be followed with regard to the draft articles, consisting in the General Assembly (a) taking note of the draft articles, to be annexed to its resolution and recommending that appropriate action by States be taken; and (b) deciding at a later stage on the possibility of concluding a convention on the topic.

38. At its 2958th and 2959th meetings, on 7 and 8 May 2008, respectively, the Commission decided to refer draft articles 1 to 13 and 14 to 20 contained in the fifth report to the Drafting Committee. Moreover, at the latter meeting, the Commission requested the Special Rapporteur to

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[9] At the 2885th meeting on 9 June 2006.

[10] At the 2903rd, 2905th and 2906th meetings on 2, 3 and 4 August 2006.

[11] At the 2903rd meeting on 2 August 2006.

[12] See also Topical summaries, A/CN.4/577 and A/CN.4/588.

prepare a draft preamble, and at its 2965th meeting, on 21 May 2008, following its consideration of a note by the Special Rapporteur containing such a preamble (A/CN.4/L.722), the Commission decided to refer the draft preamble to the Drafting Committee.

1. Relationship between the draft articles and other instruments

39. The proposal by the Special Rapporteur for the inclusion of a draft article 20,[13] on the relation to other conventions and international agreements, was seen as related to the draft articles becoming a convention, a possible outcome envisaged in the two-stage approach he had also suggested. The Drafting Committee decided to omit draft article 20; in the main, it being considered that issues concerning the relationship with other instruments were linked to questions concerning final form. Accordingly, it was premature, having adopted a two-step approach (see section C, below), for the Commission to address such issues, particularly considering also that questions of relationship raised a variety of policy considerations which were best left to negotiating parties to resolve. Such an article sought in part, on the basis of paragraph 1 of article 311 of the United Nations Convention on the Law of the Sea, to define the relationship between the present draft articles and other conventions and international agreements wholly or in part regulating matters concerning transboundary aquifers, as well as additionally clarifying the relationship between the present draft articles and the 1997 Watercourses Convention, particularly in respect of a transboundary aquifer or aquifer system which was hydraulically connected to an international watercourse in such a way as to be subject to both the present draft articles and the 1997 Convention.

40. The matters raised by the draft article were subject of comments in the plenary and in the Drafting Committee, where the point was also made that the usefulness of such an article was not precluded by whether or not the draft articles became a convention. Accordingly, it was

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[13] Draft article 20 as proposed read as follows:

Relation to other conventions and international agreements

1. The present draft articles shall not alter the rights and obligations of the States parties which arise from other conventions and international agreements compatible with the present draft articles and which do not affect the enjoyment by other States parties of their rights or the performance of their obligations under the present draft articles.

2. Notwithstanding the provisions of paragraph 1, when the States parties to the present draft articles are parties also to the Convention on the Law of the Non-navigational Uses of International Watercourses, the provisions of the latter concerning transboundary aquifers or aquifer systems apply only to the extent that they are compatible with those of the present draft articles.

important that the Commission convey its views on the text in order to assist States in their future consideration of the issue. However, some members viewed this to be a matter that could only be dealt with on a conditional basis without taking a definitive position.

41. Paragraph 1 of the proposed article 20 was criticized for not saying much and leaving a lot to implication, not least that in the event of an inconsistency the provisions of the draft articles would prevail. However, in the present case, for some members it was not at all clear whether in all instances the draft articles would of necessity have priority. A number of policy choices needed to be made before deciding which option ought to be taken in the event that a binding instrument would be negotiated, including (a) whether or not the draft articles were intended to override existing regional or other agreements, or (b) whether any future conventions ought to conform with the provisions of the present draft articles. It was recalled that article 311 of the Convention on the Law of the Sea emerged from a negotiating process which took into account policy imperatives peculiar to that Convention. A similar situation arose in the negotiation of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, whose articles 3 and 4 reflect a variety of choices developed in the negotiation.

42. On the relationship between the draft articles, in the event of their becoming a convention, and the 1997 Watercourses Convention it was considered useful that such matter be dealt with. However, two viewpoints regarding a possible overlap emerged. One view countenanced that, from a legal perspective, no such overlap existed; such a conclusion was logical since the definition of an aquifer or aquifer system for purposes of the present draft articles covered essentially "confined groundwaters" and in any event did not include the discharge zone. In contrast, article 2 (a) of the 1997 Watercourses Convention defined a watercourse for the purposes of that convention as a system of surface waters and groundwaters constituting "by virtue of their physical relationship a unitary whole and normally flowing into a common terminus".[14] Moreover, the prior discussions of the Commission with water experts seemed to confirm that the term "aquifer" applied to a body of water which was independent and did not contribute water directly to a common terminus through a river system or receive a significant amount of water from any extant surface water body. To confirm that two separate legal regimes

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[14] Article 2 (a) of the Watercourses Convention reads: "Watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.

were contemplated as covered by the two instruments, it would be important to reflect such an understanding in a preamble to the draft articles or, at the very least, the Commission should refrain from conveying in the commentary a message that an overlap existed.

43. The other view pointed to the possibility that such overlap could not be disregarded. It was noted that article 2 (a) of the 1997 Watercourses Convention offered a definition of watercourse that encompassed some groundwaters and that in the negotiation of the 1997 Watercourses Convention there was no discussion regarding the hydrological link and it would therefore be difficult to exclude any overlap particularly in situations where not all aquifers were "confined". The Commission in its 1994 resolution on confined groundwaters, adopted on the completion of the draft articles, which led to the adoption of the 1997 Watercourses Convention, commended States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwaters. Accordingly, there could be instances where two States sharing an aquifer would be governed one by the Convention and another by the present draft articles, in which case a conflict existed.

44. On whether or not the draft articles should have priority over the 1997 Convention, some members noted that such a presumption of priority was merited because of the nature of the present draft articles as a special regime in dealing with aquifers. Some other members observed that it may not always be the case that the provisions of the draft articles would have priority.

45. In addition to dealing with other conventions and international agreements, the point was made that it would be necessary to address particular relationships with existing and future bilateral and regional agreements. Equally important would be to address the question of the settlement of disputes and it was proposed that an article on this matter be considered.

2. Adoption of the draft articles and commentaries thereto

46. At its 2970th and 2971st meetings, on 3 and 4 June 2008, the Commission received the report of the Drafting Committee (A/CN.4/L.724), and at the latter meeting adopted a preamble and an entire set of 19 draft articles on the law of transboundary aquifers (see section E.1 below).

47. At its 2989th to 2991st meetings on 4 and 5 August 2008, the Commission adopted the commentaries to the aforementioned draft articles (see section E.2, below).

48. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below (see section C, below).

C. Recommendation of the Commission

49. At its 2991st meeting, on 5 August 2008, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly:

(a) To take note of the draft articles on the law of transboundary aquifers in a resolution, and to annex these articles to the resolution;

(b) To recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles;

(c) To also consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.

D. Tribute to the Special Rapporteur, Mr. Chusei Yamada

50. At its 2991st meeting, on 5 August 2008, the Commission, adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having adopted* the draft articles on the law of transboundary aquifers,
>
> *Expresses* to the Special Rapporteur, Mr. Chusei Yamada, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on the law of transboundary aquifers."

51. The Commission also acknowledged the untiring efforts of the Special Rapporteur during the development of the topic in organizing various briefings by experts on groundwaters from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), the Economic Commission for Europe (ECE) and the International Association of Hydrogeologists (IAH). In this connection the Commission also

notes that the International Association of Hydrogeologists honoured the Special Rapporteur with a distinguished associate membership award for his outstanding contribution to the field.

52. The Commission also expressed its deep appreciation to Mr. Enrique Candioti as Chairman for several years of the Working Group on Shared natural resources for his significant contribution to the work on the topic.

E. Draft articles on the law of transboundary aquifers

1. Text of the draft articles

53. The text of the preamble and draft articles adopted, on second reading, by the Commission at its sixtieth session is reproduced below.

The law of transboundary aquifers

...

Conscious of the importance for humankind of life supporting groundwater resources in all regions of the world,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Recalling General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources,

Reaffirming the principles and recommendations adopted by the United Nations Conference on Environment and Development of 1992 in the Rio Declaration on Environment and Development and Agenda 21,

Taking into account increasing demands for freshwater and the need to protect groundwater resources,

Mindful of the particular problems posed by the vulnerability of aquifers to pollution,

Convinced of the need to ensure the development, utilization, conservation, management and protection of groundwater resources in the context of the promotion of the optimal and sustainable development of water resources for present and future generations,

Affirming the importance of international cooperation and good neighbourliness in this field, *Emphasizing* the need to take into account the special situation of developing countries,

Recognizing the necessity to promote international cooperation,

. . .

PART ONE

INTRODUCTION

Article 1

Scope

The present draft articles apply to:

(*a*) Utilization of transboundary aquifers or aquifer systems;

(*b*) Other activities that have or are likely to have an impact upon such aquifers or aquifer systems; and

(*c*) Measures for the protection, preservation and management of such aquifers or aquifer systems.

Article 2

Use of terms

For the purposes of the present draft articles:

(*a*) "aquifer" means a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

(*b*) "aquifer system" means a series of two or more aquifers that are hydraulically connected;

(*c*) "transboundary aquifer" or "transboundary aquifer system" means respectively, an aquifer or aquifer system, parts of which are situated in different States;

(*d*) "aquifer State" means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;

(*e*) "utilization of transboundary aquifers or aquifer systems" includes extraction of water, heat and minerals, and storage and disposal of any substance;

(*f*) "recharging aquifer" means an aquifer that receives a non-negligible amount of contemporary water recharge;

(*g*) "recharge zone" means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;

(*h*) "discharge zone" means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

PART TWO

GENERAL PRINCIPLES

Article 3

Sovereignty of aquifer States

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft articles.

Article 4

Equitable and reasonable utilization

Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization, as follows:

(*a*) They shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;

(*b*) They shall aim at maximizing the long-term benefits derived from the use of water contained therein;

(*c*) They shall establish individually or jointly a comprehensive utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and

(*d*) They shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Article 5

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of draft article 4 requires taking into account all relevant factors, including:

(*a*) The population dependent on the aquifer or aquifer system in each aquifer State;

(*b*) The social, economic and other needs, present and future, of the aquifer States concerned;

(*c*) The natural characteristics of the aquifer or aquifer system;

(*d*) The contribution to the formation and recharge of the aquifer or aquifer system;

(*e*) The existing and potential utilization of the aquifer or aquifer system;

(*f*) The actual and potential effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;

(*g*) The availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;

(*h*) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;

(*i*) The role of the aquifer or aquifer system in the related ecosystem.

2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different kinds of utilization of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

Article 6

Obligation not to cause significant harm

1. Aquifer States shall, in utilizing transboundary aquifers or aquifer systems in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States or other States in whose territory a discharge zone is located.

2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact upon that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States or other States in whose territory a discharge zone is located.

3. Where significant harm nevertheless is caused to another aquifer State or a State in whose territory a discharge zone is located, the aquifer State whose activities cause such harm shall take, in consultation with the affected State, all appropriate response measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

Article 7

General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

Article 8

Regular exchange of data and information

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifers or aquifer systems, as well as related forecasts.

2. Where knowledge about the nature and extent of a transboundary aquifer or aquifer system is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer system, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.

3. If an aquifer State is requested by another aquifer State to provide data and information relating to an aquifer or aquifer system that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

Article 9

Bilateral and regional agreements and arrangements

For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements among themselves. Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as an agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

PART THREE

PROTECTION, PRESERVATION AND MANAGEMENT

Article 10

Protection and preservation of ecosystems

Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in an aquifer or aquifer system, as well as that released through its discharge zones, are sufficient to protect and preserve such ecosystems.

Article 11

Recharge and discharge zones

1. Aquifer States shall identify the recharge and discharge zones of transboundary aquifers or aquifer systems that exist within their territory. They shall take appropriate measures to prevent and minimize detrimental impacts on the recharge and discharge processes.

2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system and related ecosystems.

Article 12

Prevention, reduction and control of pollution

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifers or aquifer systems, including through the recharge process, that may cause significant harm to other aquifer States. Aquifer States shall take a precautionary approach in view of uncertainty about the nature and extent of a transboundary aquifer or aquifer system and of its vulnerability to pollution.

Article 13

Monitoring

1. Aquifer States shall monitor their transboundary aquifers or aquifer systems. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with competent international organizations. Where monitoring activities cannot be carried out jointly, the aquifer States shall exchange the monitored data among themselves.

2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifers or aquifer systems. They should identify key

parameters that they will monitor based on an agreed conceptual model of the aquifers or aquifer systems. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifers or aquifer systems.

Article 14

Management

Aquifer States shall establish and implement plans for the proper management of their transboundary aquifers or aquifer systems. They shall, at the request of any of them, enter into consultations concerning the management of a transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

Article 15

Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body to make an impartial assessment of the effect of the planned activities.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, legal and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, including, *inter alia*:

(*a*) Strengthening their capacity-building in scientific, technical and legal fields;

(*b*) Facilitating their participation in relevant international programmes;

(*c*) Supplying them with necessary equipment and facilities;

(*d*) Enhancing their capacity to manufacture such equipment;

(*e*) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

(*f*) Providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting their transboundary aquifer or aquifer system;

(*g*) Providing advice in the preparation of environmental impact assessments;

(*h*) Supporting the exchange of technical knowledge and experience among developing States with a view to strengthening cooperation among them in managing the transboundary aquifer or aquifer system.

Article 17

Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that affects a transboundary aquifer or aquifer system and poses an imminent threat of causing serious harm to aquifer States or other States.

2. The State within whose territory the emergency originates shall:

(*a*) Without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(*b*) In cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

4. States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.

Article 18

Protection in time of armed conflict

Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

Article 19

Data and information vital to national defence or security

Nothing in the present draft articles obliges a State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

2. Text of the draft articles with commentaries thereto

54. The text of the draft articles with commentaries thereto on the law of transboundary aquifers as adopted on second reading by the Commission at its sixtieth session are reproduced below.

General commentary

(1) The International Law Commission decided, at its fifty-fourth session (2002), on the inclusion in its programme of work of the topic entitled "Shared Natural Resources". It was generally understood that this topic included groundwaters, oil and natural gas although the point was made that the topic could also include such resources as migratory birds and other animals. The Commission decided to adopt a step-by-step approach and to focus on the consideration of transboundary groundwaters as the follow-up to the Commission's previous work on the codification of the law of surface waters[15] at least during the first reading of the draft articles. The Commission adopted on first reading a set of 19 draft articles on the law of transboundary aquifers and commentaries thereto in 2006 and transmitted them to Governments for comments and observations, as well as on the final form of the draft articles, to be submitted by 1 January 2008. The Commission, in 2007, while awaiting the comments from Governments, addressed the question of relationship between its work on transboundary aquifers and that on oil

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[15] 1997 United Nations Convention on the Law of Non-navigational Uses of International Watercourses, A/RES/229, annex of 21 May 1997.

and natural gas. It indicated its preference to proceed with and complete the second reading of the law of transboundary aquifers independently of its possible future work on oil and natural gas.[16]

(2) During the debates on the reports of the Commission in the Sixth Committee of the General Assembly at the sixty-first (2006) and sixty-second (2007) sessions, Governments offered their oral comments.[17] Written comments were also transmitted to the Secretary-General pursuant to the Commission's request.[18] The comments made by Governments on the draft articles adopted on first reading were in general favourable and supportive and the Commission was encouraged to proceed with the second reading on the basis of the first reading text of the draft articles while certain suggestions were offered for improvements. On the question of the relationship between the work on transboundary aquifers and that on oil and natural gas, the overwhelming majority supported the view that the law on transboundary aquifers should be treated independently of any future work of the Commission on the issues related to oil and natural gas. On the question of the final form of the draft articles, the views of Governments were divergent. Some supported the adoption of a legally binding instrument while some others favoured a non-legally binding instrument.

(3) The Commission, at its sixtieth session (2008), considered various comments from Governments and adopted on second reading revised texts containing a set of 19 draft articles on the law of transboundary aquifers. The adopted second reading texts are presented in the form of draft articles. Consistent with the practice of the Commission, the term "draft articles" has been used without prejudice as to the final form of the product. As the views of Governments on the final form of the draft articles were divided, the Commission decided to recommend to the General Assembly a two-step approach, consisting of the General Assembly (a) taking note of the draft articles to be annexed to its resolution and recommending that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (b) considering, at a later stage, the elaboration of a convention on the basis of the draft articles.

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[16] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 160-183.

[17] Topical summaries in documents A/CN.4/577 and A/CN.4/588.

[18] A/CN.4/595 and A/CN.4/595/Add.1.

Since there would be some time before a decision is made on the second step the Commission decided to refrain from formulating a draft article on the relationship between these draft articles and other international agreements and also a draft article on the settlement of disputes the formulation of which would become necessary only when the second step would be initiated.

(4) The Commission considered carefully for each draft article the question whether it would be necessary to structure the draft articles in such a way as to have obligations that would apply to all States generally, obligations of aquifer States *vis-à-vis* other aquifer States and obligations of aquifer States *vis-à-vis* non-aquifer States. It was decided that, in order to be effective, some draft articles would have to impose obligations on States which do not share the transboundary aquifers in question and in certain cases give rights to the latter States towards aquifer States. Moreover, in some other instances the obligations would be generally applicable to all States. In reaching these conclusions, the Commission recognized the need to protect the transboundary aquifers.

(5) The draft articles take into account many existing bilateral, regional and international agreements and arrangements on groundwaters. Many such instruments have been compiled in a publication by FAO in association with UNESCO.[19] The work on transboundary aquifers by the Commission was facilitated by the valuable contribution and assistance of groundwater scientists (hydrogeologists), groundwater administrators and water law experts. Since 2003, UNESCO, which is the coordinating agency of the United Nations system on global water problems, played a significant role through its International Hydrological Program (IHP) in providing scientific and technical advice to the Special Rapporteur and the Commission. It has mobilized coordinated action with other United Nations agencies, Commissions and Programmes, such as FAO, the ECE, and United Nations Environment Programme/Global Environmental Fund (UNEP/GEF), as well as the International Atomic Energy Agency. It also collaborated with the IAH, the Organization of American States (OAS), International Groundwater Resources Assessment Centre (IGRAC), the French-Swiss Geneva Aquifer Authority and Guarani Aquifer System Project. To those organizations, the Special Rapporteur and the Commission are

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[19] S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments* (FAO/UNESCO, 2005).

sincerely grateful. The Commission also held an informal meeting in 2004 with the Water Resource Committee of the International Law Association and wishes to acknowledge its comments on the Commission's draft articles adopted on first reading, as well as its appreciation of the ILA Berlin Rules of 2004.

(6) The second reading text of the draft articles on the Law of Transboundary Aquifers adopted by the Commission in 2008 contain several changes from the text adopted on first reading, most of which are explained in the corresponding commentaries.

Preamble

Conscious of the importance for humankind of life supporting groundwater resources in all regions of the world,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Recalling General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources,

Reaffirming the principles and recommendations adopted by the United Nations Conference on Environment and Development of 1992 in the Rio Declaration on Environment and Development and Agenda 21,

Taking into account increasing demands for freshwater and the need to protect groundwater resources,

Mindful of the particular problems posed by the vulnerability of aquifers to pollution,

Convinced of the need to ensure the development, utilization, conservation, management and protection of groundwater resources in the context of the promotion of the optimal and sustainable development of water resources for present and future generations,

Affirming the importance of international cooperation and good neighbourliness in this field,

Emphasizing the need to take into account the special situation of developing countries,

Recognizing the necessity to promote international cooperation,

...

Commentary

(1) The preamble was added on second reading in order to provide a contextual framework for the draft articles. The draft preamble follows previous precedents elaborated by the Commission, in particular on the draft articles on Prevention of transboundary harm from hazardous activities[20] and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[21]

(2) The first preambular paragraph is overarching in recognizing the importance of groundwater as a life-supporting resource for humankind. Freshwater is indispensable for the survival of humankind. Humankind depends on it for drinking and sanitation (washing and cleaning), for agricultural production and for raising livestock. There exists no substitute natural resource. Ninety-seven per cent of readily available freshwater is stored underground.[22] Due to rapid population growth and accelerated economic development, groundwater resources are being over-extracted and polluted. There exists an urgent need to introduce proper management of groundwater resources.

(3) The third preambular paragraph recalls General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources. The fourth preambular paragraph reaffirms the 1992 Rio Declaration on the Environment and Development and Agenda 21 of the United Nations Conference on Environment and Development, Chapter 18 of which espouses the application of integrated approaches to the development, management and use of water resources.

(4) The fifth, sixth and seventh preambular paragraphs project the main purposes of the present draft articles, mainly utilization and protection of groundwater resources, bearing in mind the increasing demands for freshwater, thus the need to protect groundwater resources, the

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[20] *Yearbook* of the International Law Commission 2001, vol. II (Part Two), para. 97.

[21] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 66.

[22] S. Burchi and K. Mechlem, (footnote 19), foreword - P.H. Gleick "Water Resources" in S.H. Schneider (ed.) Encyclopedia of climate change and water (New York: Oxford University Press 1996) (vol. 2), pp. 817-823 notes that of all accessible freshwater, groundwater constitutes 97 per cent.

particular problems posed by the vulnerability of the aquifers, as well as the needs of present and future generations. The eighth, ninth and tenth preambular paragraphs accord particular emphasis on international cooperation and, bearing in mind the principles of common but differentiated responsibilities, take into account the special situation of developing countries.

PART ONE

INTRODUCTION

Article 1

Scope

The present draft articles apply to:

(*a*) Utilization of transboundary aquifers or aquifer systems;

(*b*) Other activities that have or are likely to have an impact upon such aquifers or aquifer systems; and

(*c*) Measures for the protection, preservation and management of such aquifers or aquifer systems.

Commentary

(1) Draft article 1 defines the scope to which the present draft articles apply. While it is generally appropriate to denote a body of underground waters as "groundwaters", for the purposes of the present draft articles the technical term "aquifer" is opted for, as the term defined in draft article 2 is more scientifically precise and leaves no ambiguity for both lawyers and groundwater scientists and administrators. An aquifer is often hydraulically connected to one or more aquifers. In such a case, these aquifers must be treated as a single system for proper management as there is hydraulic consistency between them. This series of two or more aquifers is termed an "aquifer system". In the draft articles, aquifers and aquifer systems are always referred to jointly.

(2) The mandate given to the Commission was to codify the law on "shared natural resources". Accordingly, the present draft articles apply only to "transboundary" aquifers or aquifer systems. All the transboundary aquifers and aquifer systems will be governed by the present draft articles, regardless of whether they are hydraulically connected to international watercourses. Though

groundwaters covered by the 1997 Watercourses Convention in accordance with its article 2 (a) possess more characteristics of surface waters in that the Convention covers a system of surface waters and groundwaters constituting "by virtue of their physical relationship a unitary whole and normally flowing into a common terminus", the possibility that such groundwaters are also governed by the present draft articles could not be completely disregarded. Accordingly, when the present draft articles were to become a legally binding instrument, the need would arise to determine the relationship between the present draft articles and the 1997 Convention.

(3) Draft article 1 addresses three different categories of activities, in subparagraphs (a) to (c), which are be covered by the draft articles. Subparagraph (a) deals with utilization of aquifers which has most direct impact on aquifers. The term "utilization" was opted for instead of "uses", as "utilization" includes also the mode of uses. "Utilization" is defined in draft article 2.

(4) Subparagraph (b) deals with activities other than utilization that have or are likely to have an impact upon aquifers. The subparagraph may seem at first sight overly broad and could be interpreted as imposing unnecessary limitations on such activities. However, in the case of aquifers, it is absolutely necessary to regulate such activities in order to properly manage an aquifer or aquifer system. The obligation with respect to those activities is precisely spelled out in the substantive draft articles. Such activities are those that are carried out just above or close to an aquifer or aquifer system and cause or may cause some adverse effects on it. There must, of course, be a causal link between the activities and the effects. To illustrate, careless use of chemical fertilizer or pesticide in farming on the ground above an aquifer or aquifer system may pollute waters in the aquifer or aquifer system. The construction of a subway without appropriate surveys may destroy a geological formation of an aquifer or aquifer system or impair its recharge or discharge process. The impact upon aquifers would include deterioration of water quality, reduction of water quantity and adverse change in the functioning of the aquifers. In and of itself, the term "impact" does not relate to either a positive or a negative effect. However, the term may be understood to have a negative connotation if the context in which it is used is negative as in the case of subparagraph (b). "Impact" is broader than the concept of "harm" or "damage" which is more specific. The determination of the threshold of the impact is left to later substantive draft articles.

(5) In subparagraph (c), "measures" are meant to embrace not only those to be taken to deal with degradation of aquifers but also with their improvements and the various forms of cooperation, whether or not institutionalized.

Article 2

Use of terms

For the purpose of the present draft articles:

(*a*) "aquifer" means a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

(*b*) "aquifer system" means a series of two or more aquifers that are hydraulically connected;

(*c*) "transboundary aquifer" or "transboundary aquifer system" means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

(*d*) "aquifer State" means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;

(*e*) "utilization of transboundary aquifers or aquifer systems" includes extraction of water, heat and minerals, and storage and disposal of any substance;

(*f*) "recharging aquifer" means an aquifer that receives a non-negligible amount of contemporary water recharge;

(*g*) "recharge zone" means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;

(*h*) "discharge zone" means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

Commentary

(1) Draft article 2 defines eight terms that have been employed in the present draft articles. The technical terms have been used to make the text friendly to its intended users, namely scientific personnel and water management administrators. There are various definitions of aquifer and groundwaters in existing treaties and other international legal documents.[23] However,

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[23] Article 2, paragraph 11 of EC Directive 2000/60 of 23 October Establishing a Framework for Community Action in the Field of Water Policy:

for the purposes of the present draft articles, the definition of an aquifer in subparagraph (a) offers the precise description of the two elements of which an aquifer consists and activities relating to which must be regulated. One element is the underground geological formation which functions as a container for water. The other element is the water stored therein which is extractable. The term "water-bearing" is used in order to leave no doubt that the coverage of the present draft articles does not extend to oil and natural gas. The reference to "underground" in the first reading text has been suppressed as it is self-evident that aquifers are a subsurface geological formation. A "geological formation" consists of naturally occurring materials such as rock, gravel and sand. All the aquifers are underlain by less permeable layers which serve, as it were, as the bottom of container. Some aquifers are also upper-lain by less permeable layers. The waters stored in such aquifers are referred to as confined groundwaters as they are pressurized by more than atmospheric pressure.

(2) The definition of the "water" in an aquifer is limited to that stored in the saturated zone of the geological formation as only such water is easily extractable. The water located above the

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> "Aquifer" means a subsurface layer or layers of rock or other geological strata of sufficient porosity and permeability to allow either a significant flow of groundwater or the abstraction of significant quantities of groundwater.

The United Nations Compensation Commission, Glossary, Report and Recommendations made by the Panel of Commissioners concerning the Third Instrument of "F4" Claims (S/AC.26/2003/31):

> Aquifer: Natural water-bearing geological formation found below the surface of the earth.

Article 1, paragraph 1 of the Bellagio Draft Agreement Concerning the Use of Transboundary Groundwaters 1989:

> "Aquifer" means a subsurface water bearing geologic formation from which significant quantities of water may be extracted.

Article 3, paragraph 2 of the ILA Berlin Rules on Water Resources, 2004:

> "Aquifer" means a subsurface layer or layers of geological strata of sufficient porosity and permeability to allow either a flow of or the withdrawal of usable quantities of groundwater.

Article 1, paragraph 2 (a) of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances; Article 2 (a) of Council Directive 91/676/EEC of 12 December 1991 Concerning the Protection of Waters Against Pollution Caused by Nitrates from Agricultural Sources; Article 2, paragraph 3 of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1999; and Article 2, paragraph 2 of EC Directive 2000/60 of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy:

> "Groundwater" means all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.

Article 3, paragraph 11 of the ILA Berlin Rules on Water Resources, 2004:

> "Groundwater" means water beneath the surface of the ground located in a saturated zone and in direct contact with the ground or soil.

saturated zone of the geological formation is, like the water located underground outside an aquifer, kept in pores and in the form of vapour and cannot be easily extracted. They are like shale oil. It is of course theoretically possible to separate such waters from air and soil but it is not technically or economically possible to do so at present. The question was raised whether the draft articles should also apply to the formations containing only minimal amounts of water. While it is obvious that States are not concerned with an aquifer that has no significance to them, it would not be possible to define an absolute criterion for that. The water which is dealt with by the draft articles is essentially freshwater, a life support resource of humankind. The freshness of the water is implied in the definition and experts would use the WHO Guidelines for drinking water quality. Geological formations containing such freshwater are only found below the surface of the land. Submarine geological formations under the continental shelf do not hold freshwater and accordingly such formations and water therein fall outside the scope of the present draft articles. However, some aquifers hold brackish water and coastal aquifers which discharge into the sea interface with salt water. Brackish and low-salinity water in such aquifers could be used for irrigation or could be desalinated. The present draft articles apply also to such aquifers.

(3) An "aquifer system" consists of two or more aquifers that are hydraulically connected to each other. Such aquifers are not only of the same geological formation but could also be of different geological formations. Aquifers could be hydraulically connected vertically or horizontally as well. "Hydraulically connected" refers to a physical relationship between two or more aquifers whereby an aquifer is capable of transmitting some quantity of water to the other aquifers and vice versa. The quantity of water that is capable of being transmitted is important since an insignificant or *de minimis* quantity of water may not translate into a true hydraulic connection. The standard for determining whether a quantity is significant is directly related to the potential of the transmitting aquifer to have an effect on the quantity and quality of waters in the receiving aquifers. It would not be possible to formulate general and absolute criteria for such an effect. A judgment has to be made in each specific case on whether those aquifers should be treated as a system for the proper management of the aquifers.

(4) Subparagraph (c) defines the terms "transboundary aquifer" and "transboundary aquifer system" which are used in draft article 1 on the scope and in many other draft articles. The focus in this paragraph is on the adjective "transboundary". The paragraph provides that, in order to be

regarded as a "transboundary" aquifer or aquifer system, parts of the aquifer or aquifer system in question must be situated in different States. Whether parts of an aquifer or aquifer system are situated in different States depends on physical factors. In the case of surface waters, the existence of such factors can be easily established by simple observation. In the case of groundwaters, the determination of the existence of transboundary aquifers requires more sophisticated methods, relying on drilling and technology such as isotope tracing to define the outer limit of the aquifers.

(5) Subparagraph (d) defines the term "aquifer State", which is used throughout the draft articles. When the existence of a part of a transboundary aquifer or aquifer system is established in the territory of a particular State that State is an aquifer State for the purposes of the draft articles. Territory includes the territorial waters. In some exceptional cases, a third State may administer the territory of another State where a part of a transboundary aquifer or aquifer system is located. Whether an administering State should be deemed as an aquifer State must be decided case by case taking into account the benefit of the population utilizing such aquifer.

(6) Subparagraph (e) was formulated on second reading. Extraction of freshwater is of course the main utilization of aquifers. Other kinds of utilization, however exceptional and peripheral, should not be ignored. "Utilization" is defined in a non-exhaustive manner to include not only extraction of water but also extraction of heat for thermo-energy, extraction of minerals that may be found in aquifers, as well as storage or disposal of waste, such a new experimental technique to utilize an aquifer for carbon dioxide sequestration. It is anticipated that rules on disposal of toxic, radioactive and other hazardous waste will also be applicable.

(7) An aquifer may be recharging or non-recharging. Somewhat different rules apply to each of them. Subparagraph (f) defines a recharging aquifer. For the purposes of management of aquifers, a "non-recharging" aquifer is one that receives "negligible" water recharge "contemporarily". The term "non-negligible" refers to the recharge of some quantity of waters. Whether such quantity is "non-negligible" should be assessed with reference to the specific characteristics of the receiving aquifer, including the volume of water in the receiving aquifer, the volume of water discharged from it, the volume of water that recharges it, the rate at which the recharge occurs, etc. The term "contemporary" should be understood for convenience as the timespan of approximately 100 years, 50 years in the past and 50 years in the future. Scientists generally classify those aquifers located in an arid zone where an annual rainfall is less than

200 mm as non-recharging aquifers. It is possible to ascertain whether a particular aquifer has been receiving water recharge during the period of approximately the last 50 years by using radioactive tracers. These tracers are cesium and tritium from nuclear weapons tests with a peak of injection at 1963/1964 and krypton from the continuous emission of the nuclear industry from mid-1950s. They have been floating in the atmosphere for the last 50 years and can be detected in the aquifer that receives recharge from rainfall during that period.

(8) Each aquifer may have a "recharge zone", including a catchment area which is hydraulically connected to an aquifer and a "discharge zone", through which water from an aquifer flows to its outlet. The definitions of "recharge zone" and "discharge zone" are given in subparagraphs (g) and (h). These zones are outside the aquifer although they are hydraulically connected to it. A recharge zone contributes water to an aquifer and includes the zone where the rainfall water directly infiltrates the ground, the zone of surface runoff which eventually infiltrates the ground and the underground unsaturated zone of infiltration. The discharge zone is the area through which water from the aquifer flows to its outlet, which may be a river, a lake, an ocean, an oasis or a wetland. Such outlets are not part of the discharge zone itself. The aquifer and its recharge and discharge zones form a dynamic continuum in the hydrological cycle. The recognition of the need to protect those zones points to the importance of the protection of the overall environment on which the life of an aquifer depends. Those zones are subject of particular measures and cooperative arrangements under the provisions of the present draft articles.

PART TWO

GENERAL PRINCIPLES

Article 3

Sovereignty of aquifer States

> Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft articles.

Commentary

(1) The need to have an explicit reference in the form of draft article to the sovereignty of States over the natural resources within their territories was reaffirmed by many States,

particularly by those aquifer States that are of the opinion that water resources belong to the States in which they are located and are subject to the exclusive sovereignty of those States. It was also pointed out that groundwaters must be regarded as belonging to the States where they are located, along the lines of oil and natural gas. Reference was made, in that regard, to General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources". The reference to that resolution has been made in the preamble.

(2) Many treaties and other legal instruments refer to sovereignty of States over natural resources.[24] Draft article 3 reiterates the basic principle that States have sovereignty over an aquifer, or portions of an aquifer, located within their territory. There are basically two types of formulation in State practice with regard to this issue. One type is the positive formulation. Some have limiting conditions to the exercise of this sovereign right. An example is "States have, in accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental

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[24] (1) Treaties referring to the concept within their preambles: The Vienna Convention for the Protection of the Ozone Layer (1985); Agreement on Air Quality (Canada-United States) (1991); United Nations Framework Convention of Climate Change (1992); Convention on Biological Diversity (1992); Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994); Convention on the Sustainable Development of Lake Tanganyika (2003);

(2) Treaties referring to the concept within their provisions: Vienna Convention on Succession of States in Respect of Treaties (1978); African (Banjul) Charter on Human and Peoples' Rights (1981); United Nations Convention on the Law of the Sea (1982); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (1986); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995); Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999); African Convention on the Conservation of Nature and Natural Resources (2003);

(3) Non-binding international instruments referring to the concept: Draft Articles on Prevention on Transboundary Harm from Hazardous Activities (Adopted by the ILC at its fifty-third session, 2001); Concerted action for economic development of economically less developed countries, General Assembly resolution 1515 (XV) (1960); Permanent sovereignty over natural resources, General Assembly resolution 1803 (XVII) (1962); Stockholm Declaration of the United Nations on Human Environment (1972); Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX) (1974); Declaration on the Right to Development, General Assembly resolution 41/128 (1986); Rio Declaration on the Environment and Development (1992);

(4) Other related treaties: ASEAN Agreement on the Conservation of Nature and Natural Resources (1985, not in force):

[Treaties referring to the concept of peoples' right over the natural resources]

International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); African (Banjul) Charter on Human and Peoples' Rights (1981).

policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction".[25] The other type is the saving or disclaimer clause such as "Nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources."[26]

(3) Draft article 3 adopts the positive type and represents an appropriately balanced text. The two sentences in the draft article are necessary in order to maintain such a balance. In essence, each aquifer State has sovereignty over the transboundary aquifer or aquifer system to the extent located within its territory. The reference to "international law" has been added to indicate that, although the present draft articles have been elaborated against the background of the continued application of customary international law, there are other rules of general international law which remain applicable.

(4) The term "sovereignty" here is a reference to sovereignty over an aquifer located within the territory of an aquifer State, including the territorial sea, and is to be distinguished from the "exercise of sovereign rights", such as those exercisable over the continental shelf or in the exclusive economic zone adjacent to the territorial sea. As noted earlier in paragraph (2) of the commentary to draft article 2, aquifers in the continental shelf are excluded from the scope of the present articles.

Article 4

Equitable and reasonable utilization

Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization, as follows:

(*a*) They shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;

(*b*) They shall aim at maximizing the long-term benefits derived from the use of water contained therein;

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[25] African Convention on the Conservation of Nature and Natural Resources (2003).

[26] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (1986).

(*c*) They shall establish individually or jointly a comprehensive utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and

(*d*) They shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Commentary

(1) Transboundary aquifers are shared natural resources. Utilization of the aquifer can be divided into two categories, as the aquifer consists of the geological formation and the waters contained in it. The use of its water is most common and the water is mainly used for drinking and other human life support, such as sanitation, irrigation and industry. The utilization of the geological formation is rather rare. A typical example is the artificial recharge being undertaken in the Franco-Genevese Aquifer System where the water from the River Arve is used for such recharge. The functioning of the aquifer treats the waters with less cost than building a water treatment installation and also produces high quality water. As noted previously, an aquifer may also be used for disposal, in particular through a new experimental technique to utilize aquifers for carbon dioxide sequestration.[27] This use is peripheral to the present draft articles.

(2) Draft articles 4 and 5 are closely related. One lays down the general principle of the utilization of aquifers and the other sets out the factors of implementation of the principle. Draft article 4 in its chapeau establishes the basic principle applicable to the utilization of shared natural resources of "equitable and reasonable utilization". This principle is further elaborated in subparagraphs (a) to (d). While the concept of equitable utilization and that of reasonable utilization are different, they are closely interrelated and often combined together in various legal regimes.[28]

(3) Subparagraph (a) explains that equitable and reasonable utilization of aquifers should result in equitable allocation of benefits among the States sharing the aquifer. It is understood that "equitable" is not coterminous with "equal".

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[27] See paragraph (6) of commentary to draft article 2.

[28] See for example the 1997 Watercourses Convention, art. 5 (1).

(4) Subparagraphs (b) to (d) are more related to reasonable utilization. In various legal regimes concerning renewable natural resources, "reasonable utilization" is often defined as "sustainable utilization" or "optimum utilization". There is a well-established scientific definition of this doctrine. It is to take measures on the best scientific evidence available to maintain at, or to restore to, the level of the resources which produces the maximum sustainable yield (MSY):[29] It requires measures to keep resources in perpetuity. In the case of the 1997 Watercourses Convention, one was dealing with the renewable waters which receive substantial recharge and in that context the principle of sustainable utilization fully applied. In the case of aquifers, the situation is entirely different. The waters in aquifers, whether recharging or non-recharging, are more or less non-renewable, unless they are in artificially recharging aquifers. Thus, the aim is to "maximize the long-term benefits from the use of such waters". Such maximization could be realized through the establishment of a comprehensive utilization plan by the aquifer States concerned, taking into account present and future needs, as well as alternative water resources available to them. Subparagraphs (b) and (c) reflect these requirements. In order to acknowledge the concerns of sustainability and intergenerational equity, paragraph 7 of the preamble alludes to these matters. In subparagraph (c), the phrase "individually or jointly" is included to signify the importance of having a prior plan but it is not necessary that such a plan be a joint endeavour, at least in the initial stage, by the aquifer States concerned. A "comprehensive utilization plan" is only for a particular transboundary aquifer, not the whole water resources of the aquifer States concerned. Accordingly, alternative water resources available should be taken into account.

(5) For a recharging aquifer, it is desirable to plan a much longer period of utilization than in the case of a non-recharging aquifer. However, it is not necessary to limit the level of utilization to the level of recharge. Subparagraph (d) is for recharging aquifers, including the ones which receive an artificial recharge. It is crucial that they maintain certain physical qualities and characteristics. Accordingly, the paragraph provides that the utilization level should not be such as to prevent continuance of the effective functioning of such aquifers.

(6) Paragraph 2 of the comparable article 5 of the 1997 Watercourses Convention provides another principle for equitable and reasonable participation[30] by watercourse States which

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[29] See UNCLOS, art. 118.

[30] See paragraphs (5) and (6) of the commentary to article 5 of the 1997 Watercourses Convention. *Yearbook ... 1994*, vol. II (Part Two), p. 97.

includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof. It is not included here as it serves as an underlying basis for the provisions concerning international cooperation to be formulated in later draft articles.[31]

Article 5

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of draft article 4 requires taking into account all relevant factors, including:

(*a*) The population dependent on the aquifer or aquifer system in each aquifer State;

(*b*) The social, economic and other needs, present and future, of the aquifer States concerned;

(*c*) The natural characteristics of the aquifer or aquifer system;

(*d*) The contribution to the formation and recharge of the aquifer or aquifer system;

(*e*) The existing and potential utilization of the aquifer or aquifer system;

(*f*) The actual and potential effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;

(*g*) The availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;

(*h*) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;

(*i*) The role of the aquifer or aquifer system in the related ecosystem.

2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different kinds of utilization of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

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[31] Draft articles 7-16.

Commentary

(1) Draft article 5 lists the factors to be taken into account in determining equitable and reasonable utilization as provided for in draft article 4. It is not easy to arrange the factors so as to separate those that apply to "equitable utilization" from those that apply to "reasonable utilization". In some instances, the factors apply to both. The subparagraphs have nevertheless been arranged to achieve an internal coherence and logic without establishing any order of priority, except to the extent provided for in paragraph 2 of the present draft articles. "Factors" includes "circumstances". The rules of equitable and reasonable utilization are necessarily general and flexible and require for their proper application that aquifer States take into account concrete factors and circumstances of the resources as well as of the need of the aquifer States concerned. What is an equitable and reasonable utilization in a specific case will depend on a weighing of all relevant factors and circumstances. This draft article is almost a reproduction of article 6 of the 1997 Watercourses Convention.

(2) In subparagraph (c), "natural characteristics" is used instead of listing factors of a natural character as referred in the 1997 Watercourses Convention. The reason for this is that factors of a natural character should be taken into account, not one by one, but as characteristics relevant to aquifers. Natural characteristics refer to the physical characteristics that define and distinguish a particular aquifer. If a system approach is followed, one can separate the natural characteristics into three categories: input variables, output variables and system variables. Input variables are related to groundwater recharge from precipitation, rivers and lakes. Output variables are related to groundwater discharge to springs and rivers. System variables relate to aquifer conductivity (permeability) and storability which describe the state of the system. They are groundwater level distribution and water characteristics such as temperature, hardness, pH (acidity and alkalinity), electro-conductivity and total dissolved solids. Together, the three categories of variables describe aquifer characteristics in terms of quantity, quality and dynamics. In effect, these characteristics are identical to those identified in paragraph 1 of draft article 8, on regular exchange of data and information.

(3) Subparagraph (g) relates to whether there are available alternatives to a particular planned or existing utilization of an aquifer. In practice, an alternative would take the form of another source of water supply and the overriding factors would be comparable feasibility, practicability and cost-effectiveness in comparison with the planned or existing utilization of the aquifer. For

each of the alternatives a cost-benefit analysis needs to be performed. Beside feasibility and sustainability, the viability of alternatives plays an important role in the analysis. For example, a sustainable alternative could be considered as preferable in terms of aquifer recharge and discharge ratio, but less viable than a controlled depletion alternative.

(4) Subparagraphs (d) and (i) are factors additional to those listed in the 1997 Watercourses Convention. The contribution to the formation and recharge of the aquifer or aquifer system in subparagraph (d) means the comparative size of the aquifer in each aquifer State and the comparative importance of the recharge process in each State where the recharge zone is located. Subparagraph (i) may not seem to fall perfectly into the category of factors. The "role" signifies the variety of purposive functions that an aquifer has in a related ecosystem. This may be a relevant consideration, in particular in an arid region. There exist different meanings attached to the term "ecosystem" within the scientific community. The term "related ecosystem" must be considered in conjunction with "ecosystems" in draft article 10. It refers to an ecosystem that is dependent on aquifers or on groundwaters stored in aquifers. Such an ecosystem may exist within aquifers, such as in karst aquifers, and be dependent on the functioning of aquifers for its own survival. A related ecosystem may also exist outside aquifers and be dependent on aquifers for a certain volume or quality of groundwaters for its existence. For instance an ecosystem in some lakes is dependent on aquifers. Lakes may have a complex groundwater flow system associated with them. Some lakes receive groundwater inflow throughout their entire bed. Some have seepage loss to aquifers throughout their entire bed. Others receive groundwater inflow through part of their bed and have seepage loss to aquifers through other parts. Lowering of lake water levels as a result of groundwater pumping can affect the ecosystems supported by the lake. The reduction of groundwater discharge to the lake significantly affects the input of dissolved chemicals to the lake even in cases where such discharge is a small component of the water budget of the lake and may result in altering key constituents of the lake, such as nutrients and dissolved oxygen.

(5) Paragraph 2 clarifies that, in determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion must be reached on the basis of all of them. It remains a valid consideration that the weight to be accorded to individual factors, as well as their relevance, will vary with the circumstances. However, in weighing different kinds of utilization, special regard shall be given to vital human needs. It should be recalled that,

during the elaboration of the 1997 Watercourses Convention, the Working Group of the Whole took note of the following statement of understanding pertaining to "vital human needs": "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."[32]

Article 6

Obligation not to cause significant harm

> 1. Aquifer States shall, in utilizing transboundary aquifers or aquifer systems in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States or other States in whose territory a discharge zone is located.
>
> 2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact on that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States or other States in whose territory a discharge zone is located.
>
> 3. Where significant harm nevertheless is caused to another aquifer State or a State in whose territory a discharge zone is located, the aquifer States whose activities cause such harm shall take, in consultation with the affected State, all appropriate response measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

Commentary

(1) Further to draft article 4, draft article 6 deals with another basic principle for aquifer States. It addresses questions of significant harm arising from utilization and activities other than utilization, both as contemplated in draft article 1 as well as questions of elimination and mitigation of significant harm occurring despite due diligence efforts to prevent such harm. These aspects are respectively addressed in paragraphs 1, 2 and 3. Other than aquifer States, the State in whose territory a discharge zone of the transboundary aquifer is located may also be most likely to be affected by the circumstances envisaged in the draft article. Accordingly, the draft article has been extended to cover such other State.

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[32] Report of the Sixth Committee convening as the Working Group of the Whole, document A/51/869 of 11 April 1997, para. 8.

(2) *Sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another) is the established principle of international liability. The obligation contained in this draft article is that of "to take all appropriate measures". In the case of paragraph 1, it is implicit that the harm is caused to other States through transboundary aquifers. In the case of paragraph 2, it is expressly made clear that the draft article applies only to the harm that is caused to other States "through that aquifer or aquifer system".

(3) On the question of the threshold of "significant" harm, in its previous work, the Commission has understood "significant" as meaning something which is more than "detectable" but need not be at the level of "serious" or "substantial".[33] The threshold of "significant harm" is a flexible and relative concept. Factual considerations, rather than a legal determination, have to be taken into account in each specific case, in this case also bearing in mind the fragility of aquifers.

(4) Paragraph 3 deals with the eventuality of significant harm even if all appropriate measures are taken by the aquifer States. The reference to "activities" in the paragraph covers both "utilization" and "other activities" in paragraphs 1 and 2, as envisaged in draft article 1. That eventuality is possible because such activities have a risk of causing harm and such risk may not be eliminated. Appropriate response measures to be taken by the aquifer States also include measures of restoration.

(5) Draft article 6 is silent on the question of compensation in circumstances where significant harm resulted despite efforts to prevent such harm. It is understood that the issue of compensation is an area that will be governed by other rules of international law, such as those relating to State responsibility or to international liability for acts not prohibited by international law and does not require specialized treatment in the present draft articles.

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[33] See for example commentaries to the draft articles on the Law on the Non-navigational uses of International Watercourses, *Yearbook ... 1994*, vol. II (Part Two), para. 222; Commentaries to the draft articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook ... 2001*, vol. II (Part Two), para. 98; and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 67.

Article 7

General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

Commentary

(1) Draft article 7 sets out the principle of a general obligation of the aquifer States to cooperate with each other and contemplates procedures for such cooperation. Cooperation among aquifer States is a prerequisite for shared natural resources and the draft article serves to provide a background context for the application of the provisions on specific forms of cooperation, such as regular exchange of data and information, as well as protection, preservation and management. The importance of the obligation to cooperate is indicated in Principle 24 of the Stockholm Declaration on the Human Environment (1972). The importance of such an obligation for the present subject is confirmed by the United Nations Water Conference in Mar del Plata Action Plan in 1977 and Chapter 18, Protection of the Quality and Supply of Freshwater Resources; Application of Integrated Approaches to the Development, Management and Use of Water Resources of Agenda 21 of the United Nations Conference on Environment and Development (1992). A wide variety of international instruments on surface waters and groundwater issues call for cooperation between the parties with regard to the protection, preservation and management of transboundary aquifers.[34]

(2) Paragraph 1 provides for the basis and objectives of cooperation and reproduces in substance the text of article 8 of the 1997 Watercourses Convention. The principles of "sovereign equality" and "territorial integrity" are underlined as the basis for cooperation.

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[34] ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), Convention on the Protection of Transboundary Watercourses and International Lakes (the Helsinki Convention, 1992), Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999), Convention on Cooperation for the Sustainable Use of the River Danube (1994), Convention on the Protection of the Rhine (1999), African Convention on the Conservation of Nature and Natural Resources (2003), Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), Convention on the Sustainable Development of Lake Tanganyika (2003), and Protocol for Sustainable Development of Lake Victoria Basin (2003).

The principle of "sustainable development" has been included as a general principle that ought to be taken into account as well. The term "sustainable development" denotes the general principle of sustainable development and should be distinguished from the concept of "sustainable utilization".[35]

(3) Paragraph 2 envisages the establishment of "joint mechanisms for cooperation" which refers to a mutually agreeable means of decision-making among aquifer States. It does not exclude the possibility of using existing mechanisms. In practical terms, such joint mechanisms include a commission, an authority or other institution established by the aquifer States concerned to achieve a specified purpose. The types of cooperation may include exchange of information and databases, ensuring the compatibility of such databases, coordinated communication, monitoring, early warning and alarm system, management as well as research and development. The competence of such a body would be for the aquifer States concerned to determine. Such a mechanism is also useful in averting disputes among aquifer States.

(4) Europe has a long tradition of international river commissions such as the International Commission for the Protection of the Rhine, the Maas Commission, the Danube Commission, etc. Within these commissions or in close cooperation with them, bilateral cross-border commissions such as the Permanent Dutch-German Cross-border Water Commission operate. The existing commissions deal primarily with surface water issues. The EU Water Framework Directive 2000/60/EC[36] is implemented mainly through commissions for delineation and monitoring. These commissions will increasingly become responsible for transboundary aquifer management as well.[37] In other parts of the world, it is also expected that comparable regional organizations play a role in promoting the establishment of similar joint mechanisms.[38] It is also

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[35] See paragraph (4) of the commentary to draft article 4.

[36] The Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the community action in the field of water policy was adopted in October 2000.

[37] The EU Water Framework Directive requires member States to establish management plans. See also guidelines 2 and 8 of the Guidelines on Monitoring and Assessment of Groundwaters of the ECE (2000). See also Groundwater Daughter Directive (Directive 2006/118/EC) on the protection of groundwater.

[38] African Union: Article VII - Water, paragraph 3 of African Convention on the Conservation of Nature and Natural Resources (Maputo, 11 July 2003) and SADC: Article 5 - Institutional framework for implementation of Revised Protocol on Shared Watercourses in the Southern African Development Community (Windhoek, 7 August 2000).

noted that such joint mechanisms could be established by local administrations on both sides of the border, such as the French-Swiss Commission on the Geneva Aquifer established by Canton de Genève and Prefecture de Haute Savoie (1996).

Article 8

Regular exchange of data and information

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifers or aquifer systems, as well as related forecasts.

2. Where knowledge about the nature and extent of a transboundary aquifer or aquifer system is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer system, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.

3. If an aquifer State is requested by another aquifer State to provide data and information relating to an aquifer or aquifer system that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

Commentary

(1) Exchange of data and information on a regular basis is the first step for cooperation among aquifer States. The text of article 9 of the 1997 Watercourses Convention has been adjusted to meet the special characteristics of aquifers. It sets out the general and minimum requirements for the exchange between aquifer States of the data and information necessary to ensure the equitable and reasonable utilization of transboundary aquifers. Aquifer States require data and information concerning the condition of the aquifer in order to apply draft article 5, which calls for aquifer States to take into account "all relevant factors" and circumstances in implementing the obligation of equitable and reasonable utilization laid down in draft article 4. The rules contained in draft article 8 are residual. They apply in the absence of specially agreed regulation of the subject and they do not prejudice the regulation set out by an arrangement concluded

among the States concerned for a specific transboundary aquifer. In fact, the need is clear for aquifer States to conclude such agreements among themselves in order to provide, *inter alia*, for the collection and exchange of data and information in the light of the characteristics of the transboundary aquifer concerned.

(2) The requirement of paragraph 1 that data and information be exchanged on a regular basis is designed to ensure that aquifer States will have the facts necessary to enable them to comply with their obligations under draft articles 4, 5 and 6. In requiring the "regular" exchange of data and information, paragraph 1 provides for an ongoing and systematic process, as distinct from the *ad hoc* provision of such information as concerning planned activities envisaged in draft article 15. Paragraph 1 requires that aquifer States exchange data and information that are "readily available". This expression is used to indicate that, as a matter of general legal duty, an aquifer State is under an obligation to provide only such data and information as is at its disposal readily, for example, that it has already collected for its own use or is easily accessible. In a specific case, whether data and information are "readily" available depends on an objective evaluation of such factors as the efforts and costs which their provision would entail, taking into account the human, technical, financial and other relevant resources of the requested aquifer State. The term "readily", as used in paragraphs 1 and 3, is thus a term of art having a meaning corresponding roughly to the expression "in the light of all the relevant circumstances" or to the word "feasible", rather than, for example, "rationally" or "logically". The importance of the exchange of data and information is indicated in a wide variety of agreements.[39]

(3) The phrase in paragraph 1 "in particular of geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system" relate to the data and information that define and distinguish characteristics of the

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[39] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (the Helsinki Convention, 1992), Programme for the Development of a Regional Strategy for the Utilization of the Nubian Sandstone Aquifer System (NSAS, 2000), Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), African Convention on the Conservation of Nature and Natural Resources (2003), Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994), Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002), Framework Agreement on the Sava River Basin (2002), Convention on the Sustainable Development of Lake Tanganyika (2003), Protocol for Sustainable Development of Lake Victoria Basin (2003), Protocol Amending the 1978 Agreement between the United States of America and Canada on Great Lakes Water Quality, as Amended in 1983, and Agreement on Cooperation for the Protection and Sustainable Use of the Water of the Spanish-Portuguese Hydrographic Basins (1998).

aquifer. "Geology" describes age, composition and structure of the aquifer matrix. "Hydrogeology" describes the ability of the aquifer to store, transmit and discharge groundwaters. "Hydrology" describes elements other than groundwaters of the water cycle, primarily effective precipitation and surface water that are important for aquifer recharge, the aquifer regime, storage and discharge. Effective precipitation is the part of precipitation which enters aquifers. In other words, it is total precipitation minus evaporation, surface run-off and water retained by vegetation. "Meteorology" provides data on precipitation, temperature and humidity which is necessary to calculate evaporation. "Ecology" provides data on plants necessary to calculate plants' transpiration. "Hydrochemistry" yields data on chemical composition of the water necessary to define water quality. Aquifer States are required by paragraph 1 to exchange not only data and information on the present condition of the aquifer, but also related forecasts. The forecasts envisaged would relate to such matters as weather patterns and the possible effects thereof upon water levels and flow; the amount of recharge and discharge; foreseeable ice conditions; possible long-term effects of present utilization; and the condition or movement of living resources. The requirement in paragraph 1 applies even in the relatively rare instances in which an aquifer State is not utilizing, or has no plan of utilizing, the transboundary aquifer.

(4) Paragraph 2 is formulated recognizing full well that there is lack of information and knowledge regarding the nature and scope of some aquifers. Data and information in this draft article relate to data and information concerning the conditions of aquifers. Such data and information include not only raw statistics but also the results of research and analysis. Data and information concerning monitoring, utilization of aquifers, other activities affecting aquifers and their impact on aquifers are dealt with in later draft articles. There is also the need to encourage States to establish inventories of aquifers. Many States are still unaware of the extent, quality and quantity of their aquifers.

(5) Paragraph 3 concerns requests for data or information that are not readily available in the State from which they are sought. In such cases, the State in question is to employ its "best efforts" to comply with the request. It is to act in good faith and in a spirit of cooperation in endeavouring to provide the data or information sought by the requesting aquifer State. In the absence of agreement to the contrary, aquifer States are not required to process the data and information to be exchanged. Under paragraph 3, however, they are to employ their best efforts

to comply with the request. But the requested State may condition its compliance with the request on payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing the data. The expression "where appropriate" is used in order to provide a measure of flexibility, which is necessary for several reasons. In some cases, it may not be necessary to process data and information in order to render it usable by another State. In other cases, such processing may be necessary in order to ensure that the material is usable by other States, but this may entail undue burdens for the State providing the material.

(6) For data and information to be of practical value to aquifer States, they must be in a form which allows them to be easily usable. Paragraph 4 therefore requires aquifer States to use their "best efforts to collect and to process data and information in a manner which facilitates their utilization" by the other aquifer State. A collective effort should be made to integrate and make compatible, whenever possible, existing databases of information.

Article 9

Bilateral and regional agreements and arrangements

> For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements among themselves. Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as an agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

Commentary

(1) The importance of bilateral or regional agreements and arrangements that take due account of the historical, political, social and economic characteristics of the region and of the specific transboundary aquifer must be stressed. The draft article has thus been placed in Part Two dealing with general principles. The first sentence of the draft article calls upon the aquifer States to cooperate among themselves and encourages them to enter into bilateral or regional agreements or arrangements for the purpose of managing the particular transboundary aquifer. The concept of reserving the matter to the group of aquifer States concerned with the particular aquifer is based on the principles that are set forth in the United Nations Convention on the Law

of the Sea.[40] It also corresponds to the "watercourse agreements" provided for in article 3 of the 1997 Watercourses Convention. In the case of surface watercourses, numerous bilateral and regional agreements have been concluded. In the case of aquifers, international collective measures are still in an embryonic stage and the framework for cooperation remains to be properly developed. Therefore, the term "arrangements" has been used in addition to "agreements".

(2) This draft article also provides that the States concerned should have equal opportunity to participate in such agreements or arrangements. Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization. When an agreement or arrangement is for the entire aquifer or aquifer system, all the aquifer States sharing the same aquifer or aquifer system are most likely to be involved except for some rare cases. On the other hand, when an agreement or arrangement is for any part of the aquifer or for a particular project, only a few of the aquifer States sharing the same aquifer would be involved. In any event, the second sentence obligates the aquifer States not to enter into an agreement or arrangement which would adversely affect, to a significant extent, the position of the excluded aquifer States without their express consent. It is not meant to give a veto power to those other States. The determination of adverse effect to a significant extent to the excluded aquifer States would have to be made only on a case-by-case basis.

PART THREE

PROTECTION, PRESERVATION AND MANAGEMENT

Article 10

Protection and preservation of ecosystems

> Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in an aquifer or aquifer system, as well as that released through its discharge zones, are sufficient to protect and preserve such ecosystems.

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[40] UNCLOS, article 118 (Cooperation of States in the Conservation and Management of Living Resources of the High Seas) and article 197 (Cooperation on Global or Regional Basis).

Commentary

(1) Draft article 10 introduces Part Three by laying down a general obligation to protect and preserve the ecosystems within a transboundary aquifer and also the outside ecosystems dependent on the aquifer by ensuring adequate quality and sufficient quantity of discharge water. Like article 192 of the United Nations Convention on the Law of the Sea and article 20 of the 1997 Watercourses Convention, draft article 10 contains obligations of both protection and preservation. These obligations relate to the "ecosystems" within and outside transboundary aquifers. "Ecosystem" refers generally to an ecological unit consisting of living and non-living components that are interdependent and function as a community. An external impact affecting one component of an ecosystem may cause reactions among other components and may disturb the equilibrium of the entire ecosystem, resulting in impairing or destroying the ability of an ecosystem to function as a life-support system.

(2) There are certain differences in the modalities of the protection and preservation of the ecosystem within aquifers and those of the outside ecosystems dependent on the aquifers. Protection and preservation of aquatic ecosystems within the aquifers help to ensure their continued viability as life-support systems. Protection and preservation of the quality and quantity of the discharge water exert great influence on the outside ecosystems such as in oases and lakes. Protection and preservation of the ecosystems in the recharge and discharge zones by non-aquifer States are to be governed by draft article 11, paragraph 2.

(3) The obligation to "protect" the ecosystems requires the aquifer States to shield the ecosystems from harm or damage. The obligation to "preserve" the ecosystems applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition. It requires that these ecosystems be treated in such a way as to maintain, as much as possible, their natural state. Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life-support systems.

(4) The obligation of States to take "all appropriate measures" is limited to the protection of relevant ecosystems. This allows States greater flexibility in the implementation of their responsibilities under this provision. It was, in particular, noted that there may be instances in which changing an ecosystem in some appreciable way may be justified by other considerations, including the planned usage of the aquifer in accordance with the draft articles.

(5) There are ample precedents for the obligation contained in draft article 10 in the practice of States and the works of international organizations. The ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) provides for the obligation of conservation of species and ecosystems and conservation of ecological processes.[41] The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) sets out the obligation to "ensure conservation and, where necessary, restoration of ecosystems". The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London Protocol, 1999) provides for the obligation to "take all appropriate measures for the purpose of ensuring ... effective protection of water resources used as sources of drinking water, and their related water ecosystems, from pollution from other causes". The Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002) provides that: "[T]he Parties shall, individually and, where appropriate, jointly, take all measures to protect and preserve the ecosystems of the Incomati and Maputo watercourses." The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligation to take all appropriate measures, individually or jointly and where appropriate with participation of all stakeholders to protect, conserve and where necessary rehabilitate the Basin and its ecosystems.

Article 11

Recharge and discharge zones

> 1. Aquifer States shall identify the recharge and discharge zones of transboundary aquifers or aquifer systems that exist within their territory. They shall take appropriate measures to prevent and minimize detrimental impacts on the recharge and discharge processes.
>
> 2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system and related ecosystems.

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[41] ASEAN Agreement on the Conservation of Nature and Natural Resources (1985).

Commentary

(1) Groundwater experts explain the importance of the measures to be taken for the protection and preservation of recharge and discharge zones in order to ensure the proper functioning of an aquifer. Maintenance of a normal recharge or a discharge process is vital for the proper functioning of aquifers. Pursuant to the definition of "aquifer" in paragraph (a) of draft article 2, recharge or discharge zones are located outside aquifers. Accordingly, a separate draft article is required to regulate such zones. Paragraph 1 deals with the obligations of aquifer States with regard to the protection of recharge and discharge zones that exist within their territory. There are two phases for implementing such obligations. The first is to identify the recharge or discharge zones and the second is to take appropriate measures to prevent and/or minimize detrimental impacts on the recharge and discharge process. Once the recharge and discharge zones are identified and as far as they are located in the territories of the aquifer States concerned, those States are under the obligation to take appropriate measures to minimize detrimental impacts on recharge and discharge processes. Such measures play a pivotal role for the protection and preservation of the aquifer. It is noted that it is vitally important to take all measures in recharge zones to prevent pollutants from entering the aquifer. However, the obligation to protect the recharge zone from polluting the aquifers is dealt with in the context of draft article 12 which deals specifically with pollution.

(2) Paragraph 2 deals with the case where recharge or discharge zone of a particular transboundary aquifer is located in a State other than the aquifer State that shares the transboundary aquifer in question. Considering the importance of the recharge and discharge process, a non-aquifer State in whose territory a recharge or discharge zone is located is required to cooperate with aquifer States to protect the aquifer and its related ecosystem. It should be recalled, in this regard, that aquifer States are themselves covered by the general duty to cooperate in draft article 7.

Article 12

Prevention, reduction and control of pollution

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifers or aquifer systems, including through the recharge process, that may cause significant harm to other aquifer States. Aquifer States shall take a precautionary approach in view of uncertainty about the nature and extent of a transboundary aquifer or aquifer system and of its vulnerability to pollution.

Commentary

(1) Draft article 12 sets forth the general obligation of aquifer States to prevent, reduce and control pollution of their transboundary aquifers that may cause significant harm to other aquifer States through the transboundary aquifers and the aquifer related environment. The problem dealt with here is essentially the quality of water contained in the aquifers. This provision is a specific application of the general principles contained in draft articles 4 and 6.

(2) Some transboundary aquifers are already polluted to varying degrees, while others are not. In view of this state of affairs, draft article 12 employs the formula "prevent, reduce and control" in relation to pollution. This expression is used in the 1982 United Nations Convention on the Law of the Sea in connection with marine pollution and in the 1997 Watercourses Convention.[42] With respect to both the marine environment and international watercourses, the situation is similar. The obligation to "prevent" relates to new pollution, while the obligations to "reduce" and "control" relate to existing pollution. As with the obligation to "protect" ecosystems under draft article 10 the obligation to "prevent ... pollution ... that may cause significant harm" includes the duty to exercise due diligence to prevent the threat of such harm. This obligation is signified by the words "may cause". The requirement that aquifer States "reduce and control" existing pollution reflects the practice of States. A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to an aquifer State of origin would be grossly disproportionate to the benefit that would accrue to an aquifer State experiencing the harm. On the other hand, failure of the aquifer State of origin to exercise due diligence in reducing the pollution to acceptable levels would entitle the affected State to claim that the State of origin had breached its obligation to do so.

(3) This draft article requires that the measures in question be taken "individually and, where appropriate, jointly". The obligation to take joint action derives from certain general obligations contained in draft article 7, in particular in its paragraph 2.

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[42] See for example UNCLOS, arts. 195 and 196 (Duty not to transfer damage or hazards or transform one type of pollution into another and use of technologies or introduction of alien or new species, respectively) and 1997 Watercourses Convention, art. 21 (Prevention, reduction and control of pollution).

(4) The obligations of prevention, reduction and control all apply to pollution "that may cause significant harm to other aquifer States". Pollution below that threshold might not fall within the present article but, depending upon the circumstances, might be covered by draft article 10.

(5) The second sentence of this draft article obligates aquifer States to take a "precautionary approach". Considering the fragility and scientific uncertainty of aquifers, a precautionary approach is required. The Commission was well aware of the differing views on the concept of "precautionary approach" as opposed to that of "precautionary principle". It decided to opt for the term "precautionary approach" because it is the less disputed formulation, on the understanding that the two concepts lead to similar results in practice when applied in good faith. It is true that there are several regional treaties or conventions in which "precautionary principle" is expressly mentioned.[43] As far as universal treaties or conventions are concerned, different expressions, such as "precautionary approach" and "precautionary measures" are used.[44]

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[43] The Convention for the Protection of the Marine Environment of the North-East Atlantic (1992 OSPAR Convention), ILM, vol. 32 (1993), p. 1032, the Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992), United Nations, Law of the Sea Bulletin, No. 22 (1993), p. 54, the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, UNEP, Selected Multilateral Treaties …, p. 448, as amended in 1995, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992), United Nations, *Treaty Series*, vol. 1936, p. 269, the Treaty Establishing the European Community and the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention, 1991), ILM, vol. 30 (1991), p. 773, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London Protocol, 1999), United Nations document MP.WAT/2000/1, the Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), United Nations document ECE/CEP 104, the Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994), O.J. L.342, 12.12.1997, p. 19, the Convention on the Protection of the Rhine (1999), O.J. L.289, 16.11.2000, p. 31, the Convention on the Sustainable Development of Lake Tanganyika (2003), FAOLEX (FAO legal database online) and the Convention on the Sustainable Development of Lake Victoria Basin (2003), FAOLEX (FAO legal database online).

[44] For example, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Protocol, 1996), ILM, vol. 36 (1997), p. 7, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), United Nations, *Treaty Series*, vol. 2167, p. 3, use the expression of "precautionary approach". The United Nations Framework Convention on Climate Change (1992), United Nations, *Treaty Series*, vol. 1771, p. 107, provides for the obligation to take "precautionary measures".

Article 13

Monitoring

> 1. Aquifer States shall monitor their transboundary aquifers or aquifer systems. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with competent international organizations. Where monitoring activities cannot be carried out jointly, the aquifer States shall exchange the monitored data among themselves.
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> 2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifers or aquifer systems. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifers or aquifer systems. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifers or aquifer systems.

Commentary

(1) Draft article 13 applies to aquifer States and serves as precursor to draft article 14 on management. Most groundwater experts (scientists and administrators) emphasize that monitoring is indispensable for the proper management of a transboundary aquifer. In practice, monitoring is usually initiated individually by the State concerned, and also in many cases by local government, and develops later into a joint effort with the neighbouring States concerned. However, experts agree that the ultimate and ideal monitoring is joint monitoring based on an agreed conceptual model of the aquifer. Where it is not feasible for the aquifer States to act jointly, it is important that they share data on their monitoring activities.

(2) Paragraph 1 sets forth the general obligation to monitor and the sequence of such monitoring activities, whether jointly or individually. The purposes of monitoring are: (a) to clarify the conditions and utilization of a specific transboundary aquifer in order to take effective measures for its protection, preservation and management; and (b) to keep regular surveillance of the aquifer in order to acquire the information about any change or damage at an early stage. Monitoring needs to cover not only the conditions of the aquifer but also utilization of the aquifer such as withdrawal and artificial recharge of water. Effective monitoring through international cooperation will also contribute to further development of scientific knowledge about transboundary aquifers. The importance of monitoring is widely recognized in many

international instruments, for example, the Charter on Groundwater Management 1989[45] and the Guidelines on Monitoring and Assessment of Groundwaters 2000,[46] both prepared by the Economic Commission for Europe; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992 Helsinki Convention); and the African Convention on the Conservation of Nature and Natural Resources (2003 Maputo Convention).

(3) There are various international instruments that provide for joint monitoring of a specific transboundary aquifer. The Programme for the Development of a Regional Strategy for the Utilization of the Nubian Sandstone Aquifer System (NSAS) established in 2000 provides an example. One of the agreements for the execution of this programme is the Terms of Reference for Monitoring and Data Sharing.[47] The Framework Convention on the Protection and Sustainable Development of the Carpathians (2003) also provides for the obligation to pursue the policies aiming at joint or complementary monitoring programmes, including the systematic monitoring of the state of the environment. The Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994) provides not only for an obligation to harmonize individual monitoring but also for an obligation to elaborate and implement joint programmes for monitoring the riverine conditions in the Danube catchment area concerning water quality and quantity, sediments and riverine ecosystem. The EU Directive 2000/60/EC sets out that "Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district."

(4) Where the aquifer States can agree to establish such a joint mechanism, it is the most effective approach. However, there are many cases where the aquifer States concerned have not yet initiated any consultation or have not yet reached any agreement to establish a joint mechanism. Even in such cases, they are, at least, under an obligation to conduct individual monitoring and share the result with the other aquifer States concerned. The African Convention on the Conservation of Nature and Natural Resources (2003) sets out the obligation of each Party

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[45] It was adopted by ECE in 1989. See E/ECE/1197, ECE/ENVWA/12.

[46] They were drafted by the UN/ECE Task Force on Monitoring & Assessment under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992) and were endorsed by the Parties to the Convention in March 2000.

[47] These agreements were prepared within the framework of the programme but are not yet in force.

to monitor the status of their natural resources as well as the impact of development activities and project upon such resources. The Convention on the Sustainable Development of Lake Tanganyika (2003) includes the obligation of monitoring in the provision for the prevention and control of pollution. The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligation of monitoring undertaken by individual States in a standardized and harmonized manner.

(5) Draft article 13 is also related to draft article 8 on regular exchange of data and information. For the implementation of the obligation of regular exchange of data and information, effective monitoring is required. However, the data and information required by draft article 8 is limited to those concerning the condition of the aquifer. Paragraph 2 addresses more directly the modalities and parameters for monitoring. It provides the essential elements of the obligation of aquifer States to realize effective monitoring, i.e. the agreement or harmonization of the standard and the methodology for monitoring. It is important that aquifer States agree on the standards and methodology to be used for monitoring or on means to have their different standards or methodology harmonized as a common indicator for monitoring. Without such agreement or harmonization, collected data would not be useful. Before a State can use data collected by other States, it must first understand when, where, why and how such data were collected. With such "metadata" (data about data), the State can independently assess the quality of those data sets and, if they meet their minimum data standards, the State can proceed with harmonizing available data and interpreting the consolidated database. In the case of the French-Swiss Commission on the Geneva Aquifer, the two sides started with their own data standards and, with time and practice, reached the level of harmonized data. The aquifer States should also agree on the conceptual model of the specific aquifer in order to be able to select key parameters which they will monitor. There are two kinds of conceptual models. One is the physical matrix and the other is the hydrodynamic model. The aquifer States can agree on a model at the beginning and then change it as they gain better knowledge of the aquifer as a result of monitoring. Key parameters to be monitored include the condition of the aquifer and the utilization of the aquifer. The data on the condition of the aquifer relate to extent, geometry, flow path, hydrostatic pressure distribution, quantities of flow, hydrochemistry, etc., and are equivalent to those fields listed in paragraph 1 of draft article 8.

(6) The Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002) sets out the obligation of each Party to establish comparable monitoring systems, methods and procedures and implement a regular monitoring programme, including biological and chemical aspects for the Incomati and Maputo watercourses and report, at the intervals established by the Tripartite Permanent Technical Committee (TPTC), on the status and trends of the associated aquatic, marine and riparian ecosystems in relation to the water quality of the said watercourses. The Framework Agreement on the Sava River Basin (2002) provides for the obligation of the Parties to agree to establish a methodology of permanent monitoring of implementation of the Agreement and activities based upon it.

(7) While the general obligations are formulated in mandatory language, the modalities for achieving compliance with the main obligations remain recommendatory, in order to facilitate compliance by States. Monitoring would generally be less important when the aquifer or aquifer system is not utilized.

Article 14

Management

> Aquifer States shall establish and implement plans for the proper management of their transboundary aquifers or aquifer systems. They shall, at the request of any of them, enter into consultations concerning the management of a transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

Commentary

(1) Draft article 14 sets out the obligation of the aquifer States to establish and implement plans for the proper management of their transboundary aquifers. In view of the sovereignty over the aquifer located in the State's territory and the need for cooperation among aquifer States, two kinds of obligations are introduced in the present draft article: first, the obligation of each aquifer State to establish its own plan with regard to its aquifer and to implement it; and second, the obligation to enter into consultations with other aquifer States concerned at the request of any of the latter States.

(2) Paragraph 2 of article 24 of the 1997 Watercourses Convention provides that "'management' refers, in particular, to: (a) planning of the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and (b) otherwise promoting the rational and optimal utilization, protection and control of the watercourse". Exactly the same definition is accepted in the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000). This protocol entered into force in 2003. Such a definition could be used in the present subject *mutatis mutandis*, bearing in mind draft article 4.

(3) The rules in relation to the management of transboundary aquifers are provided in Part Two. The obligations to utilize them in an equitable and reasonable manner, not to cause harm to other aquifer States and to cooperate with other aquifer States are the basis of the proper management of transboundary aquifers. The term "management" encompasses the measures to be taken for the maximization of the long-term benefits derived from the utilization of aquifers. It also includes the protection and preservation of transboundary aquifers.

(4) It is understood that the principles provided by the present draft articles are intended to provide a framework to assist States in elaborating plans of management of the aquifers. Consultations among aquifer States are an essential component of the management process. There is great value in the joint management of aquifers and it should be done wherever appropriate and possible. However, it is also recognized that in practice it may not always be possible to establish such a mechanism. Thus the establishment and implementation of such plans may be done individually or jointly.

(5) The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides for the obligation to manage water resources "so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs". The Protocol to this Convention (London Protocol, 1999) further clarifies the elements to be considered for the purpose of water management. The Convention on the Protection and Sustainable Development of the Carpathians (2003) sets out the obligation of "river basin management". The African Convention on the Conservation of Nature and Natural Resources (2003) provides for the obligation to "manage their water resources so as to maintain them at the highest possible quantitative and qualitative

(6) There are some examples in which a regional institution or mechanism is established for the purpose of the management of a specific water regime. The Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000) "seeks to promote and facilitate the establishment of shared watercourse agreements and Shared Watercourse Institutions for the management of shared watercourses". The Framework Agreement on the Sava River Basin (2002) provides for the obligation to "cooperate to achieve the establishment of sustainable water management". It also sets out the obligation "to develop joint and/or integrated plan on the management of the water resources of the Sava River Basin …". The Convention on the Sustainable Development of Lake Tanganyika (2003) sets out the obligation of the management of the natural resources of Lake Tanganyika and establishes the Lake Tanganyika Authority. One of the functions of this Authority is to advance and represent the common interest of the Contracting States in matters concerning the management of Lake Tanganyika and its Basin. The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligations of Parties and the Commission established by this Protocol with regard to the management plans for the conservation and the sustainable utilization of the resources of the Basin.

Article 15

Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body to make an impartial assessment of the effect of the planned activities.

Commentary

(1) It is recalled that the 1997 Watercourses Convention has nine articles with detailed provisions on planned activities on the basis of State practice. In contrast, a minimalist approach is taken in this draft article due to the scarcity of State practice with respect to aquifers. The draft article applies to any State that has reasonable ground for believing that a planned activity in its territory could affect a transboundary aquifer and thereby cause a significant adverse effect on another State. Thus, the provision does not apply only to aquifer States.

(2) The activities to be regulated in this draft article could be carried out either by organs of States or by private enterprises. This draft article sets out a sequence of actions or procedures that may be contemplated. Paragraph 1 sets out the minimum obligation of a State to undertake prior assessment of the potential effect of the planned activity. A State is required to assess the potential effects of the planned activity only when it has reasonable grounds for anticipating the probability of adverse effects. Moreover, the State is not under this obligation if the assessment is not practicable. Planned activities include not only utilization of transboundary aquifers but also other activities that have or are likely to have an impact upon those aquifers.

(3) The obligation of the assessment by a State that is planning an activity is provided in a wide variety of treaties and conventions. For example, the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) sets forth the obligation to "endeavour to make environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment or the natural resources of another Contracting Party or the environment or natural resources beyond national jurisdiction". The African Convention on the Conservation of Nature and Natural Resources (2003) provides for the obligation "to ensure that policies, plans, programmes, strategies, projects and activities likely to affect natural resources, ecosystems and the environment in general are the subject of adequate impact assessment at the earliest possible stage". The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (1998) provides that "The Parties shall adopt the necessary provisions to ensure that projects and activities covered by this Agreement which, owing to their nature, size and location, must be subjected to trans-border impact assessment are so assessed before they are approved." Furthermore, the

Protocol on environmental protection to the Antarctic Treaty, in its article 8, provides that all activities in the Antarctic Treaty area shall be subject to environmental impact assessment procedures.

(4) The importance of the environmental impact assessment is also indicated in the instruments prepared by the United Nations. For example, the Charter on Groundwater Management (1989) prepared by the United Nations Economic Commission for Europe provides that "All projects in any economic sector expected to affect aquifers adversely should be subject to an assessment procedure aiming at evaluating the project's possible impact on the water regime and/or the quality of groundwater resources, with particular attention to the important role groundwater plays in the ecological system." Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources (1992) of the Agenda 21 suggests that all States should implement "Mandatory environmental impact assessment of all major water resource development projects potentially impairing water quality and aquatic ecosystems."

(5) The results from the assessment contribute to the sound planning of the activity. They also constitute the basis for the further procedures in paragraphs 2 and 3. Those paragraphs establish a procedural framework designed to avoid disputes relating to planned activities. When the assessment of the potential effects of a planned activity conducted in accordance with paragraph 1 indicates that such activity would cause adverse effect on the transboundary aquifers and that it may have a significant adverse effect on other States, the State of origin is obliged under paragraph 2 to notify the States concerned of its finding. Such timely notification is to be accompanied by available technical data and information, including environmental impact assessment, and is to provide the would-be affected States with the necessary information to make their own evaluation of the possible effects of the planned activity.

(6) If the notified States are satisfied with the information and the assessment provided by the notifying States, they have common ground to deal with the planned activity. On the other hand, if they disagree on the assessment of the effects of the planned activity, they have an obligation to endeavour to arrive at an equitable resolution of the situation in accordance with paragraph 3. The precondition to such resolution would be for the States concerned to have a common

understanding of the possible effects. To that end, consultations, and, if necessary, negotiations, or independent fact-finding are envisaged in this draft article with a view to reaching an equitable solution to a particular situation. Article 33 of the 1997 Watercourses Convention provides for a compulsory recourse to such fact-finding. It seems that there exists no evidence as yet for such an obligation in relation to groundwaters. Accordingly, an optional reference to such a fact-finding mechanism is provided. The lack of explicit detailed procedures should not be construed as authorizing any action which would nullify the purpose of this draft article. For instance, the States concerned would in principle refrain, upon request, from implementing or permitting implementation of the planned activity during the course of the consultation or negotiation which must be amicably completed within a reasonable period of time. The States concerned should act in good faith.

(7) The procedure provided for in this draft article is based on the criterion that the planned activity may have "a significant adverse effect" upon other States. This threshold of "significant adverse effect" is contingent and anticipatory and is lower than that of "significant harm" under draft article 6.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, technical, legal and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, including, *inter alia*:

(*a*) Strengthening their capacity-building in scientific, technical and legal fields;

(*b*) Facilitating their participation in relevant international programmes;

(*c*) Supplying them with necessary equipment and facilities;

(*d*) Enhancing their capacity to manufacture such equipment;

(*e*) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

(*f*) Providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting their transboundary aquifer or aquifer system;

(*g*) Providing advice in the preparation of environmental impact assessments;

(*h*) Supporting the exchange of technical knowledge and experience among developing States with a view to strengthening cooperation among them in managing the transboundary aquifer or aquifer system.

Commentary

(1) Draft article 16 deals with technical cooperation with developing States. It should be highlighted that the term "cooperation" was preferred to the term "assistance" in this draft article; it better represents the two-sided process necessary to foster sustainable growth in developing States through the protection and management of aquifers or aquifer systems. Pursuant to the chapeau of draft article 16, States are required to promote scientific, educational, technical, legal and other cooperation for protection and management of transboundary aquifers and they may do so directly or through competent international organizations. Legal cooperation has been included on second reading. It is understood that the list of activities in subparagraphs is neither cumulative nor exhaustive. The types of cooperation listed represent some of the various options available to States to fulfil the obligation to promote cooperation in the areas contemplated by the draft article. States are not required to engage in each of the types of cooperation listed, but will be allowed to choose their means of cooperation, including those not listed such as financial assistance.

(2) The science of groundwaters, hydrogeology, is rapidly developing. Such new and rapidly developing scientific knowledge is mainly owned by developed States and is not yet fully shared by many developing States. Scientific and technical cooperation with developing States has been provided through the competent international organizations. UNESCO-IHP plays a central role in this field and is the global intergovernmental scientific programme of the United Nations system which can respond to specific national and regional needs and demands. The regional arrangements are also developing successfully due to wide ranges of assistance rendered by the competent international organizations. In subparagraph (a), the broader concept of strengthening capacity building is employed to emphasize the need for training and in subparagraph (h), the need to provide support of the exchange of technical knowledge and experience among developing States is stressed.

(3) The obligation under this draft article is one of the modalities of cooperation among States and its roots are to be found in article 202 (Scientific and technical assistance to developing States) of the 1982 United Nations Convention on the Law of the Sea. The Stockholm Declaration of the United Nations Conference on the Human Environment (1972) indicates the importance of technological assistance as a supplement to the domestic effort of the development and the special consideration of developing States for the purpose of development and environmental protection (Principles 9 and 12). The Rio Declaration on Environment and Development suggests the common but differentiated responsibilities in Principle 7. Principle 9 of this Declaration mentions that "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies."

(4) The elements of cooperation stipulated in this draft article are also mentioned in several conventions and treaties. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides for the obligation of mutual assistance. The Protocol on Water and Health to that Convention (London Protocol, 1999) emphasizes the importance of the "education and training of the professional and technical staff who are needed for managing water resources and for operating systems of water supply and sanitation" and of the "updating and improvement of their knowledge and skills". This protocol enumerates the aspects in which international support for national action is required as follows: (a) preparation of water-management plans in transboundary, national and/or local contexts and of schemes for improving water supply and sanitation; (b) improved formulation of projects, especially infrastructure projects, in pursuance of such plans and schemes, in order to facilitate access to sources of finance; (c) effective execution of such projects; (d) establishment of systems for surveillance and early-warning systems, contingency plans and response capacities in relation to water-related disease; (e) preparation of legislation needed to support the implementation of this Protocol; (f) education and training of key professional and technical staff; (g) research into, and development of, cost-effective means and techniques for preventing, controlling and reducing water-related disease; (h) operation of effective networks to monitor and assess the provision and quality of water-related services, and development of integrated information systems and databases; (i) achievement of quality assurance for monitoring activities, including inter-laboratory comparability. It is also noted that the United Nations

Convention to Combat Desertification (1994) provides a specific article regarding the obligations of developed country Parties in article 6. It enumerates such obligations and one of them is to "promote and facilitate access by affected country Parties, particularly affected developing country Parties, to appropriate technology, knowledge and know-how".

(5) The obligation of mutual cooperation is also provided in regional conventions. One of the examples is the African Convention on the Conservation of Nature and Natural Resources (2003), which sets out the obligation to "encourage and strengthen cooperation for the development and use, as well as access to and transfer of, environmentally sound technologies on mutually agreed terms", and, to this effect, to "adopt legislative and regulatory measures which provide for, *inter alia*, economic incentives for the development importation, transfer and utilization of environmentally sound technologies in the private and public sectors".

(6) The importance of the scientific and technical assistance is also mentioned in other non-binding declarations. The Mar del Plata Action Plan adopted in the United Nations Water Conference in 1977 points out the lack of sufficient scientific knowledge about water resources. With regard to groundwater, it recommends that the countries should "(i) Offer assistance for the establishment or strengthening of observational networks for recording quantitative and qualitative characteristics of ground-water resources; (ii) Offer assistance for the establishment of ground-water data banks and for reviewing the studies, locating gaps and formulating programmes of future investigations and prospection; (iii) Offer help, including personnel and equipment, to make available the use of advanced techniques, such as geophysical methods, nuclear techniques, mathematical models, etc.".[48]

(7) Chapter 18 of Agenda 21 adopted in the United Nations Conference on Environment and Development (1992) points out that one of the four principal objectives to be pursued is "to identify and strengthen or develop, as required, in particular in developing countries, the appropriate institutional, legal and financial mechanisms to ensure that water policy and its implementation are a catalyst for sustainable social progress and economic growth".[49] And it suggests that "All States, according to their capacity and available resources, and through

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[48] The Mar del Plata Action Plan, 4, (b).

[49] Agenda 21, 18.9 (d).

bilateral or multilateral cooperation, including the United Nations and other relevant organizations as appropriate, could implement the following activities to improve integrated water resources management: … . (o) Development and strengthening, as appropriate, of cooperation, including mechanisms where appropriate, at all levels concerned, namely: … (iv) At the global level, improved delineation of responsibilities, division of labour and coordination of international organizations and programmes, including facilitating discussions and sharing of experiences in areas related to water resources management".[50] It also points out that one of the three objectives to be pursued concurrently to integrate water-quality elements into water resource management is "human resources development, a key to capacity-building and a prerequisite for implementing water-quality management".[51] The Plan of Implementation of the World Summit on Sustainable Development (2002) also mentions technical assistance.[52]

Article 17

Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that affects a transboundary aquifer or aquifer system and poses an imminent threat of causing serious harm to aquifer States or other States.

2. The State within whose territory the emergency originates shall:

(*a*) Without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(*b*) In cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

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[50] Agenda 21, 18.12.

[51] Agenda 21, 18.38 (c).

[52] The Plan of Implementation of the World Summit on Sustainable Development (2002), IV, 25.

4. States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.

Commentary

(1) Draft article 17 deals with the obligations of States in responding to actual emergency situations that are related to transboundary aquifers. The 1997 Watercourses Convention contains a similar provision in article 28. In the case of aquifers, emergencies might not be as numerous and destructive as in the case of watercourses. However, an article on this aspect is necessary in view, for example, of the devastating tsunami disaster along the coast of the Indian Ocean, which resulted from a great earthquake that occurred off Banda Aceh, Indonesia, in December 2004. A tsunami or cyclone could flood seawater into an aquifer or an earthquake could destroy an aquifer.

(2) Paragraph 1 gives the definition of "emergency" for the purposes of the draft article. The commentary to paragraph 1 of article 28 of the 1997 Watercourses Convention explains that the definition of "emergency" contains a number of important elements, and includes several examples that are provided for purposes of illustration. As defined, an "emergency" must cause, or pose an imminent threat of causing, "serious harm" to other States. The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the draft article. The element of "suddenness" is crucial for the application of the draft article. However, it also covers instances which could be predicted by weather forecast. Moreover, it may include creeping situations, including those that occur suddenly but are a consequence of factors accumulated over a period of time. The term "imminent threat" has a factual meaning which should not be conflated with notions associated with threats to international peace and security and any attendant consequences that may ensue in accordance with the Charter of the United Nations. The term "serious harm" means harm more grave than "significant harm". Finally, the situation may result either "from natural causes ... or from human conduct".

(3) The State in whose territory the emergency originates is required under paragraph 2, subparagraph (a) to notify, "without delay and by the most expeditious means available", other potentially affected States and competent international organizations of the emergency. A similar

obligation is contained, for example, in the 1986 Convention on Early Notification of a Nuclear Accident, the 1982 United Nations Convention on the Law of the Sea and a number of agreements concerning transboundary aquifers.[53] "Without delay" means immediately upon learning of the emergency, and the phrase "by the most expeditious means available" means that the most rapid means of communication that is accessible is to be utilized. The States to be notified are not confined to aquifer States since non-aquifer States may also be affected by an emergency. The subparagraph also calls for the notification of "competent international organizations". Such an organization would have to be competent to participate in responding to the emergency by virtue of its constituent instrument. Most frequently, such an organization would be one established by the aquifer States to deal, *inter alia*, with emergencies. The question of compensation is not addressed nor implied at all by the present draft articles. While there may well be no liability on the part of a State for the harmful effects in another State of an emergency originating in the former and resulting entirely from natural causes, the obligations under paragraph 2, subparagraphs (a) and (b) would nonetheless apply to such an emergency.

(4) Paragraph 2, subparagraph (b) requires that a State within whose territory an emergency originated "immediately take all practicable measures … to prevent, mitigate and eliminate any harmful effects of the emergency". The effective action to counteract most emergencies resulting from human conduct is that to be taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are "feasible, workable and reasonable". Further, only such measures as are "necessitated by the circumstances" need to be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. The obligation of the States concerned is that of conduct and not result. Like paragraph 2, subparagraph (a), paragraph 2, subparagraph (b) foresees the possibility that there will be a competent international organization, such as a joint commission, with which the States may cooperate in taking the requisite measures. Cooperation with potentially affected States (including non-aquifer States) is also provided for. Such cooperation may be especially appropriate in the case of contiguous aquifers or aquifer systems or where a potentially affected State is in a position to render cooperation in the territory of the aquifer State where the emergency originated.

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[53] 1986 Convention, art. 2 (Notification and information), UNCLOS, art. 198 (Notification of imminent or actual damage).

(5) UNESCO-IHP has the project "Groundwater for Emergency Situations" (GWES). The aim of the project is to consider natural and human-induced catastrophic events that could adversely influence human health and life and to identify in advance potential safe, low vulnerability groundwater resources which could temporarily replace damaged supply systems. Secure drinking water for endangered populations is one of the highest priorities during and immediately after disasters.

(6) The obligation of immediate notification to other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States is suggested in Principle 18 of the Rio Declaration on Environment and Development (1992). Several regional conventions provide for the obligation of notification without delay to the potentially affected States, regional commission or agency and other competent organizations. These include, for example, the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000), the Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002), the Convention on the Sustainable Development of Lake Tanganyika (2003) and the Protocol for Sustainable Development of Lake Victoria Basin (2003). The African Convention on the Conservation of Nature and Natural Resources (2003) sets out the right of the State Party to be provided with all relevant available data by the other Party in whose territory environmental emergency or natural disaster occurs and is likely to affect the natural resources of the former State.

(7) Some of the conventions have established mechanisms or systems for the early notification of emergency situations. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides that "The Riparian Parties shall without delay inform each other about any critical situation that may have transboundary impact" and provides for the obligation to set up, where appropriate, and to operate coordinated or joint communication, warning and alarm systems. The Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994) establishes a "coordinated or joint communication, warning and alarm systems" and provides for the

obligation to consult on ways and means of harmonizing domestic communication, warning and alarm systems and emergency plans. The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (1998) provides for the obligation of the Parties of establishment or improvement of joint or coordinated communication systems to transmit early warning or emergency information.

(8) Paragraph 3 provides for exceptions to the obligations under draft articles 4 and 6 in an emergency. Aquifer States may temporarily derogate from the obligations under those draft articles where water is critical for the population to alleviate an emergency situation. Although the 1997 Watercourses Convention does not contain such a clause, in the case of aquifers, special account should be taken in an emergency situation of vital human needs. For example, in the case of natural disasters, such as earthquakes or floods, an aquifer State must immediately satisfy the need of their population for drinking water. In the case of watercourses, the States could meet such requirement without derogation from the obligations as the recharge of the water to the watercourses would be likely to be sufficient. However, in the case of aquifers, the States concerned would not be able to do so as there would be no recharge or little recharge. Accordingly, the States must be entitled to exploit the aquifer temporarily without fulfilling the obligations under draft articles 4 and 6. It has to be stressed that the draft article relates only to the temporary derogation. There might be cases where the States would not be able to fulfil the obligations in other draft articles also in an emergency. In such a case, the States could invoke circumstances precluding wrongfulness in general international law such as *force majeure*, distress or necessity.

(9) Paragraph 4 sets forth an obligation of assistance for all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency. Groundwater scientists and administrators are unanimous in recognizing the need for joint efforts by all the States to cope effectively with an emergency. Assistance required would relate to coordination of emergency actions and communication, providing trained emergency response personnel, response equipment and supplies, extending scientific and technical expertise and humanitarian assistance.

Article 18

Protection in time of armed conflict

Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.

Commentary

(1) Draft article 18 concerns the protection to be accorded to transboundary aquifers and related installations in time of armed conflict. The 1997 Watercourses Convention contains an article regarding the same subject and the basic idea of the present article is the same. This draft article, which is without prejudice to existing law, does not lay down any new rule. The principal function of the draft article is to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers; principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning water resources and related works. These provisions fall generally into two categories: those concerning the protection of water resources and related works; and those dealing with the utilization of such water resources and works. Since detailed regulation of this subject matter would be beyond the scope of a framework instrument, draft article 18 does no more than to refer to each of these categories of principles and rules.

(2) Draft article 18 is not addressed only to aquifer States, in view of the fact that transboundary aquifers and related works may be utilized or attacked in time of armed conflict by non-aquifer States as well.

(3) The obligation of the aquifer States to protect and utilize transboundary aquifers and related works in accordance with the present draft articles should remain in effect even during the time of armed conflict. Warfare may, however, affect transboundary aquifers as well as the protection and utilization thereof by aquifer States. In such cases, draft article 18 makes it clear that the rules and principles governing armed conflict apply, including various provisions of conventions on international humanitarian law to the extent that the States in question are bound by them. For example, the poisoning of water supplies is prohibited by the Hague Convention of 1907 Concerning the Laws and Customs of Land Warfare and article 54 of Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, while article 56 of that Protocol

protects dams, dikes and other works from attacks that "may cause the release of dangerous forces and consequent severe losses among the civilian population". Similar protections apply in non-international armed conflicts under articles 14 and 15 of Protocol II Additional to the 1949 Geneva Conventions. Also relevant to the protection of water resources in time of armed conflict is the provision of Protocol I that "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage." In cases not covered by a specific rule, certain fundamental protections are afforded by the "Martens clause". That clause, which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law. In essence, it provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. Paragraph 2 of draft article 5 of the present draft articles, provides that in reconciling a conflict between utilizations of transboundary aquifers special attention is to be paid to the requirement of vital human needs.

Article 19

Data and information vital to national defence or security

> Nothing in the present draft articles obliges a State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft article 19 creates a very narrow exception to the requirement of the draft articles requiring provision of information. The same rule is provided in the 1997 Watercourses Convention. During the first reading, the focus was placed on the confidentiality aspects by using the word "essential" to qualify the confidentiality of such data and information than on whether or not such data and information was vital to national defence or security, without meaning to change the substance of the text. On further review during the second reading, the Commission decided that there was no compelling reason to deviate from the language of the 1997 Watercourses Convention.

(2) States cannot be realistically expected to agree to the release of information that is vital to their national defence or security. At the same time, however, an aquifer State that may experience adverse effects of planned measures should not be left entirely without information concerning those possible effects. Draft article 19 therefore requires the State withholding information to "cooperate in good faith with the other States with a view to providing as much information as possible under the circumstances". The exception created by draft article 19 does not affect the obligations that do not relate to the transmission of data and information.

(3) The question of the protection of industrial and commercial secrets, intellectual property rights, the right to privacy, important cultural or natural treasures were considered. It was understood that sharing of data and information required by the present draft articles could well be carried out without infringing those rights.

CHAPTER V

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

55. During its fifty-sixth session (2004), the Commission decided[54] to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.

56. At its fifty-seventh (2005) to fifty-ninth (2007) sessions, the Commission had before it the first to third reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1 and A/CN.4/578 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1).[55]

57. At the 2928th meeting, on 31 May 2007, the Commission decided to establish a working group, under the chairmanship of Mr. Lucius Caflisch, to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report. At its 2946th meeting, on 2 August 2007, the Commission adopted the report of the Working Group.[56] At the 2946th meeting, the Commission further decided to refer to the Drafting Committee draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special

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[54] At its 2830th meeting, on 6 August 2004. *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda. The Commission had, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work. *Ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission. *Ibid.*, annex. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

[55] At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice, as well as any other relevant information. *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 112.

[56] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), paras. 323-324.

Rapporteur in his third report, as well as draft article 4 as proposed by the Working Group, together with the recommendations of the Working Group.[57]

B. Consideration of the topic at the present session

58. At the present session, the Commission decided, at its 2964th meeting on 16 May 2008, to re-establish the Working Group on the Effects of Armed Conflicts on Treaties, under the chairmanship of Mr. Lucius Caflisch, to complete its consideration of several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report during the fifty-ninth session in 2007.

59. The Working Group had before it the fourth report of the Special Rapporteur (A/CN.4/589), which was referred to it by the plenary, dealing with the question of the procedure for suspension or termination, a Note prepared by the Chairperson of the Working Group (A/CN.4/L.721) on the question of the applicability of articles 42 to 45 of the Vienna Convention on the Law of Treaties, as well as a compilation of comments and observations received from international organizations (A/CN.4/592 and Add.1).

60. The Working Group considered the following four issues: (a) the question of the applicability, in relation to draft article 8, of the procedure in article 65 of the Vienna Convention on the Law of Treaties for the termination or suspension of treaties; (b) the question of the applicability, also in relation to draft article 8, of articles 42 to 45 of the Vienna Convention on the Law of Treaties, and, in particular, article 44 on the separability of treaty provisions; (c) draft article 9, on the resumption of suspended treaties, as proposed by the Special Rapporteur in his third report; and (d) draft articles 12, 13 and 14, as proposed by the Special Rapporteur in his third report, relating to third States as neutrals, the termination or suspension of treaties by operation of the Vienna Convention, and the competence of parties to negotiate a specific agreement regulating the maintenance in force or revival of treaties, respectively. At its 2968th meeting, on 29 May 2008, the Commission adopted the report of the Working Group (A/CN.4/L.726).

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[57] The Commission also approved the recommendation of the Working Group that the Secretariat circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them. *Ibid.*, para. 272.

61. At the same meeting, the Commission decided to refer to the Drafting Committee draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14, as proposed by the Working Group, as well as draft articles 12 and 13, as proposed by the Special Rapporteur, together with the recommendations of the Working Group contained in its report.

62. The Commission considered the reports of the Drafting Committee at its 2973rd and 2980th meetings, on 6 June and 17 July 2008, and at the latter meeting adopted on first reading a set of 18 draft articles on the effects of armed conflicts on treaties, together with an annex (see section C below). At the 2993rd and 2994th meetings, on 6 August 2008, the Commission adopted a set of commentaries to the draft articles on the effects of armed conflicts on treaties, as adopted on first reading (see section D below).

63. At the 2993rd meeting, on 6 August 2008, the Commission decided, in accordance with articles 16 to 21 of its Statute to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2010.

64. At its 2994th meeting, held on 6 August 2008, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Ian Brownlie, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the effects of armed conflicts on treaties. It also acknowledged the untiring efforts and contribution of the Working Group on Effects of armed conflicts on treaties under the chairmanship of Mr. Lucious Caflisch.

C. Text of the draft articles on Effects of armed conflicts on treaties adopted by the Commission on first reading

1. Text of the draft articles

65. The text of the draft articles adopted at the sixtieth session by the Commission on first reading is reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

Article 1

Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States where at least one of the States is a party to the armed conflict.

Article 2

Use of terms

For the purposes of the present draft articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "Armed conflict" means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Article 3

Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

(*a*) Between the States parties to the armed conflict;

(*b*) Between a State party to the armed conflict and a third State.

Article 4

Indicia of susceptibility to termination, withdrawal or suspension of treaties

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

(*a*) Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) The nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty.

Article 5

The operation of treaties on the basis of implication from their subject matter

In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

Article 6

Conclusion of treaties during armed conflict

1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

2. States may conclude lawful agreements involving termination or suspension of a treaty that is operative between them during situations of armed conflict.

Article 7

Express provisions on the operation of treaties

Where a treaty expressly so provides, it shall continue to operate in situations of armed conflict.

Article 8

Notification of termination, withdrawal or suspension

1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.

2. The notification takes effect upon receipt by the other State party or States parties.

3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal or suspension of the operation of the treaty.

Article 9

Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 10

Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(*a*) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

Article 11

Loss of the right to terminate, withdraw from or suspend the operation of a treaty

A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:

(*a*) It has expressly agreed that the treaty remains in force or continues in operation; or

(*b*) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 12

Resumption of suspended treaties

The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4.

Article 13

Effect of the exercise of the right to individual or collective self-defence on a treaty

A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right.

Article 14

Decisions of the Security Council

The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Article 15

Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict if the effect would be to the benefit of that State.

Article 16

Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Article 17

Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*:

(*a*) The agreement of the parties; or

(*b*) A material breach; or

(*c*) Supervening impossibility of performance; or

(*d*) A fundamental change of circumstances.

Article 18

Revival of treaty relations subsequent to an armed conflict

The present draft articles are without prejudice to the right of States parties to an armed conflict to regulate, subsequent to the conflict, on the basis of agreement, the revival of treaties, terminated or suspended as a result of the armed conflict.

Annex

Indicative list of categories of treaties referred to in draft article 5

(*a*) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

(*b*) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(*c*) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(*d*) Treaties for the protection of human rights;

(*e*) Treaties relating to the protection of the environment;

(*f*) Treaties relating to international watercourses and related installations and facilities;

(*g*) Treaties relating to aquifers and related installations and facilities;

(*h*) Multilateral law-making treaties;

(*i*) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(*j*) Treaties relating to commercial arbitration;

(*k*) Treaties relating to diplomatic relations;

(*l*) Treaties relating to consular relations.

2. Text of the draft articles with commentaries thereto

66. The texts of the draft articles with commentaries thereto as adopted by the Commission on first reading at its sixtieth session are reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

Article 1

Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States where at least one of the States is a party to the armed conflict.

Commentary

(1) Draft article 1 situates, as the point of departure for the elaboration of the draft articles, the Vienna Convention on the Law of Treaties, of 1969 (the "Vienna Convention"), article 73 of which provides, *inter alia*, that the provisions of the Convention do not prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States.[58] Thus, the present draft articles apply to the effects of an armed conflict in respect of treaties between States.

(2) The formulation of draft article 1 is patterned on article 1 of the Vienna Convention. The reference at the end of the sentence to "where at least one of the States is a party to the armed conflict" is intended to specify that the draft articles are also to cover the position of third States parties to a treaty with a State involved in an armed conflict. Accordingly, three scenarios would be contemplated: (a) the situation concerning the treaty relations between two States engaged in an armed conflict; (b) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not party to that conflict; and (c), the situation of the effect of an internal armed conflict on the treaty relations of the State in question with third States.

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[58] At its fifteenth session (1963), the Commission concluded that the draft articles on the law of treaties should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It felt that such a study would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse *to* the particular hostilities in question. Consequently, it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. *Yearbook ... 1963*, vol. II, para. 14. Article 73 expressly reserving the problem was added at the Conference.

(3) In the Sixth Committee of the General Assembly several delegations expressed the view that the draft articles should apply also to a treaty or a part of a treaty which were being provisionally applied.[59] In the view of the Commission, the issue can be resolved by reference to the provisions of article 25 of the Vienna Convention itself.[60]

(4) The question of the effect on treaties involving international organizations has not been considered in the draft articles at this stage. Therefore, the present draft articles do not deal with the effect of armed conflict on treaties involving international organizations.

(5) Structurally the present draft articles are divided into several clusters: First, draft articles 1 and 2 are introductory in nature, dealing with scope and use of terms. Secondly, draft articles 3, 4 and 5 constitute the core provisions, reflecting the underlying foundation of the draft articles, which is to favour legal stability and continuity. They are reflective of a presumption of continuity of treaty relations. Thirdly, draft articles 6 and 7 extrapolate from the basic principles in draft articles 3 to 5, a number of basic legal propositions. These draft articles are expository in character. Fourthly, draft articles 8 to 12 address a variety of ancillary aspects of termination, withdrawal and suspension, drawing upon corresponding provisions of the Vienna Convention. Finally, the incidence of armed conflict bears not only on the law of treaties but also other fields of international law, including obligations of States under the Charter of the United Nations. Accordingly, draft articles 13 to 18 deal with a number of miscellaneous issues with regard to such relationships through *inter alia* without prejudice or saving clauses.

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[59] See comments by the Netherlands (2005), A/C.6/60/SR.18, para. 40; and Malaysia (2006), A/C.6/61/SR.19, para. 48.

[60] United Nations, *Treaty Series*, vol. 1155, p. 331.

"*Article 25*

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

Article 2

Use of terms

For the purposes of the present draft articles:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "armed conflict" means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Commentary

(1) Draft article 2 provides definitions for two key terms used in the draft articles.

(2) Paragraph (a) defines the term "treaty", by reproducing verbatim the formulation in article 2 (1) (a) of the Vienna Convention. No particular distinction is drawn between bilateral and multilateral treaties.

(3) Paragraph (b) defines the term "armed conflict" as a working definition for the purposes of the present draft articles only. It is not the intention to provide a definition of armed conflict for international law generally, which is difficult and beyond the scope of the topic.[61]

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[61] See 1985 resolution by the Institute of International Law on "The Effects of Armed Conflicts on Treaties" adopted on 28 August 1985, Session of Helsinki - 1985:

> "*Article 1*
>
> For the purpose of this resolution, the term 'armed conflict' means a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict."

Available at: http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03. It should be noted that article 73 of the Vienna Convention on the Law of Treaties 73, refers to "the outbreak of hostilities between States, while in the *Prosecutor v. Dusko Tadic* it was noted that: "… an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, *Prosecutor v. Duško Tadić a/k/a "DULE"*, Appeals Chamber, 2 October 1995, para. 70 (1994-1995), 1 ICTY JR 352, at para. 70.

(4) The definition applies to treaty relations between States Parties to an armed conflict, as well as a State party to an armed conflict and a third State. The formulation of the provision, particularly the reference to "between a State party to the armed conflict and a third State", is intended to cover the effects of an armed conflict which may vary according to the circumstances. Accordingly, it also covers the situation where the armed conflict only affects the operation of a treaty with regard to one of the Parties to a treaty, and it recognizes that an armed conflict may affect the obligations of Parties to a treaty in different ways. That phrase also serves to include within the scope of the draft articles the possible effect of an internal armed conflict on treaty relations of a State involved in such conflict with another State. The emphasis of the effects is on the application or operation of the treaty rather than the treaty itself.

(5) As regards the requirement of intensity implied in the phrase "which by their nature or extent are likely to affect", an element of flexibility has been retained in the draft articles to accord with the wide variety of historical situations. Hence, in some situations, it is possible to say that the level of intensity is less of a factor, for example, in relation to low-level conflict in a border-region which, despite such a low level of intensity, drastically affects the application of bilateral treaties regulating the control of border traffic. On the other hand, it is also recognized that there exist historical situations where the nature or extent of the armed conflict does have a bearing on the application of treaties.

(6) It was also considered that it was desirable to include situations involving a state of war in the absence of armed actions between the parties.[62] It thus follows that the definition includes the occupation of territory which meets with no armed resistance. In this context the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. Article 18 provides in relevant part as follows:

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[62] See A. McNair and A.D. Watts, *The Legal Effects of War* (Cambridge: Cambridge University Press, 1966) (4th edition), pp. 2-3.

"Article 18 - Application of the Convention

"1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

"2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

(7) Similar considerations militate in favour of the inclusion of a blockade even in the absence of armed actions between the parties.[63]

(8) Contemporary armed conflicts have blurred the distinction between international and internal armed conflicts. The number of civil wars had increased and were statistically more frequent than international armed conflicts. In addition, many of these "civil wars" include "external elements", such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than, international armed conflicts. The draft articles therefore include the effect on treaties of internal armed conflicts.

(9) The definition of "armed conflict" does not include an explicit reference to "international" or "internal" armed conflict. This is intended to avoid reflecting specific factual or legal considerations in the draft article, and, accordingly, running the risk of *a contrario* interpretations.

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[63] *Ibid.*, pp. 20-21.

Article 3

Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

(*a*) Between the States parties to the armed conflict;

(*b*) Between a State party to the armed conflict and a third State.

Commentary

(1) Draft article 3 is of an overriding significance. It establishes the basic principle of legal stability and continuity. To that end it incorporates the key developments in the 1985 resolution of the Institute of International Law, shifting the legal position in favour of a regime establishing a presumption that an outbreak of armed conflict does not as such cause the suspension or termination of the treaty. At the same time, it is recognized that there is no easy way of reconciling the principle of stability, in draft article 3, with the fact that the outbreak of armed conflict may result in terminating or suspending treaty obligations.

(2) This formulation is a replication of article 2[64] of the resolution adopted by the Institute of International Law in 1985. The principle has been commended by a number of authorities. *Oppenheim* asserts that "the opinion is pretty general that war by no means annuls every treaty".[65] Lord McNair, expressing what are substantially British views, states: "It is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents."[66] During the work of the Institute in 1983 Professor Briggs said that:

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[64] Article 2 of the resolution of the Institute reads as follows:

> The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.

[65] Hersch Lauterpacht (ed.), *Oppenheim's International Law*, vol. II, *Disputes, War and Neutrality* (Longman: 1948), p. 302.

[66] A. McNair, *The Law of Treaties* (Oxford: Clarendon, 1961), p. 697.

> "Our first - and most important - rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law."[67]

(3) The possibility of replacing "necessarily" with "automatically" in order to be consistent with the title was considered, but it was decided against it, since "necessarily" was closer to "*ipso facto*", which was frequently used in this context as in articles 2 and 5[68] of the resolution adopted by the Institute of International Law.

(4) In order to be more consistent with draft article 2, Use of terms, subparagraph (a) refers to "States parties" to the armed conflict, while subparagraph (b) covers the operation of treaties between "a State party" to the armed conflict and a third State.

(5) The possibility of including withdrawal from a treaty, as one of the consequences of an outbreak of armed conflict, alongside suspension or termination, in draft article 3 was considered but rejected, since withdrawal involves a conscious decision by a State, whereas draft article 3 deals with the automatic application of law.

Article 4

Indicia of susceptibility to termination, withdrawal or suspension of treaties

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

(*a*) Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) The nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject-matter of the treaty and the number of parties to the treaty.

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[67] *Annuaire de l'Institut de droit international*, vol. 61 (I), pp. 8 and 9; and see also H. Briggs, *The Law of Nations* (London: Stevens & Sons, 1953) (Second edition), p. 938.

[68] Article 5 of the resolution of the Institute reads as follows:

> The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of bilateral treaties in force between a party to that conflict and third States.
>
> The outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.

Commentary

(1) Draft article 4 follows from the content of draft article 3. The outbreak of armed conflict does not necessarily put an end to or suspend the operation of the treaty. It is another key provision of the draft articles.

(2) In contrast to draft article 3, withdrawal from treaties as one of the possibilities open to States parties to an armed conflict is included in the present draft article. The question of withdrawal in the present draft article provides an appropriate context for its inclusion in subsequent ancillary draft articles.

(3) As regards the *indicia* listed in subparagraphs (a) and (b), proposals were considered to replace "*indicia*" by terms such as "factors" and "criteria", but it was decided to retain "*indicia*" so as to avoid any implication that they are established requirements. They are to be viewed as mere indications of susceptibility which would be relevant for particular cases depending on the circumstances.

(4) It is also understood that the *indicia* listed in subparagraph (b) were not to be seen as being exhaustive. Indeed, it should be recalled that articles 31 and 32 of the Vienna Convention, which are referred to in subparagraph (a), themselves contain a number of *indicia* to be taken into account.

(5) The question of the legality of the use of force as one of the factors to be taken into consideration under draft article 4 was examined, but it was decided to leave the matter to be resolved within the context of the application of draft articles 13 to 15.

(6) It cannot be assumed that the effect of armed conflict between Parties to the same treaty would be the same as that on treaties between a party to an armed conflict and a third State.

Article 5

Operation of treaties on the basis of implication from their subject matter

In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

Commentary

(1) Draft article 5 is expository in character and relates to cases where the subject matter of a treaty implies that the operation of treaty as a whole or some of its provisions is not affected by the incidence of armed conflict.[69]

(2) The reference to "necessary" implication, as contained in the original text has been removed so as to avoid any possible contradiction with draft article 4. In addition, the initial reference to "object and purpose" has been replaced with "subject matter". The text was refined at the end with the replacement of "inhibit" by "affect" which is more in line with the language used in the draft articles.

(3) The proposal of the Special Rapporteur for former draft article 7 included a list of categories of treaties whose subject matter involved the necessary implication that they would continue in operation during an armed conflict. The identification of such a list gave rise to differences of opinion both in the Commission and in the Sixth Committee.

(4) In the debate in the Commission in the 2005 session, the policy of the provisions of former draft article 7 was explained by the Special Rapporteur as follows:

> "… [T]he draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the

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[69] This draft article has its origins in former draft article 7, as proposed by the Special Rapporteur. This former draft article was as follows:

> "The operation of treaties on the basis of necessary implication from their object and purpose
>
> 1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.
>
> 2. Treaties of this character include the following: […]"

categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded."[70]

(5) In the Sixth Committee, the use of categories was, for example, the object of carefully articulated comment by the United States, at the sixtieth session of the General Assembly, in 2005:

> "Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed."[71]

(6) The Commission decided instead to include such a list in an annex to the draft articles. Thus an annex containing a list of categories of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict has been included in relation to the present draft articles. Although the emphasis is on categories of treaties it may well be that only the subject matter of particular provisions of the treaty may carry the necessary implication of their continuance. Moreover, it was decided that the content of

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[70] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 167.

[71] Summarized in A/C.6/60/SR.20, para. 34.

former draft article 7, paragraph 1, in an adjusted form, should be located after draft article 4, as present draft article 5. A proposal to include it as an additional paragraph in draft article 4 was not considered appropriate as it would have affected the balance of that article.

(7) The list is exclusively indicative and no priority is in any way implied by the order in which the categories appear in the annex. Moreover, it is recognized that in certain instances the categories are cross-cutting and there would be overlaps. The Commission decided not to include within the list an item referring to *jus cogens*. This category is not qualitatively similar to the other categories which have been included in the list. These categories are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of draft article 5 are without prejudice to the effect of principles or rules having the character of *jus cogens*. Some members nevertheless thought that a category of treaties embodying *jus cogens* norms merited being listed.

(8) The selection of categories of treaties is based in large part upon doctrine, together with available State practice. It is recognized that the likelihood of a substantial flow of information indicating evidence of State practice from States is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. It is often the case that apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some cases, such as treaties creating permanent regimes, there is a firm base in State practice. In relation to other categories there is a firm basis in the jurisprudence of municipal courts and some executive advice to courts, but the categories are not necessarily supported by State practice in a conventional mode.

(a) *Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law*

(9) The sources inevitably recognize that treaties expressly applicable to the conduct of hostilities are not affected in case of an armed conflict. The British practice is described by Lord McNair as follows:

> "There is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination.[72]

(10) This principle is accepted generally both in the doctrine and in the practice of States. In 1963 the General Counsel of the United States Department of Defense, referring to the application of the Nuclear Test Ban Treaty in time of war, stated the following:[73]

> "It is my opinion, shared by the Legal Adviser of the Department of State, that the treaty cannot properly be so construed."

He continued

> "... it should be noted that it is standard practice in treaties outlawing the use of specified weapons or actions in time of war for the treaties to state expressly that they apply in time of war, in order to prevent possible application of the rule that war may suspend or annul the operation of treaties between the warring parties. (Cf., *Karnuth v. United States*, 279 U.S. 231, 236-239; *Oppenheim's 'International Law'*, vol. II, 7th ed., pp. 302-306) ... [74]

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[72] A. McNair, *The Law of Treaties* (footnote 66 above), p. 704.

> "There were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856, and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other prize courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of 'Accessions, Withdrawals, Etc.', published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that
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> > in the view of His Majesty's Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war." *ibid.*

[73] Whiteman, *Digest of International Law*, vol. XIV, pp. 509 and 510.

[74] See, e.g.: "International Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg, 29 November, 11 December 1868);

"International Declaration Respecting Asphyxiating Gases, The Hague, 29 July 1899; International Declaration Respecting Expanding Bullets, The Hague, 29 July 1899;

> "In the present case, language specifically prohibiting the use of nuclear weapons in wartime does not appear; it must, therefore, be presumed that no such prohibition would apply."

(11) Some members of the Commission wondered whether this category was necessary in light of draft article 7 which states that where a treaty so provides, it shall continue to operate in situations of armed conflict. As pointed out, the list is only indicative in character. Moreover, the present rubric is broader than treaties expressly applicable during armed conflict. It covers broadly treaties relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, article 24 of the treaty of friendship and commerce between Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.[75] Moreover, the *Third Restatement of the Law*, while restating the position under traditional international law that an outbreak of war between States terminated or suspended agreements between them, acknowledges that "agreements governing the conduct of hostilities survived, since they were designed for application during war …"[76] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that "as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used".[77]

"International Convention Concerning the Laws and Customs of War on Land, The Hague, 18 October 1899;

"Protocol for the Prohibition of the Use in War of Asphyxiating Gases, Poisonous, or other Gases, and of Bacteriological methods of Warfare, Geneva, 17 June 1925;

"1949 Geneva Conventions on Wounded and Sick (art. 2); Prisoners of War (art. 2); Civilians (art. 2); …"

[75] Treaty of Friendship and Commerce entered into by Prussia and the United States at The Hague, art. 24 (10 September 1785) cited in H.W. Verzijl, (ed.) *International Law in Historical Perspective* (Leyden, Sijthoff, 1973) at p. 371.

[76] American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, § 336 (e) (1987).

[77] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* of 8 July 1996, *I.C.J. Reports 1996*, at para. 89.

(12) In any event the implication of continuity does not affect the application of the law of armed conflict as the *lex specialis* applicable to armed conflict. The identification of this rubric does not address numerous questions that may arise in relation in the application of that law. Nor is it intended to hold sway as to the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

(b) *Treaties declaring, creating, or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries*

(13) The doctrine ranging over several generations recognizes that treaties declaring, creating, or regulating a permanent regime or status or related permanent rights are not suspended or terminated in case of an armed conflict. The types of agreements involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, the creation of exceptional rights of user or access in respect of the territory of a State.

(14) There is a certain amount of State practice supporting the position that such agreements are unaffected by the incidence of armed conflict. McNair describes the relevant British practice,[78] and Tobin asserts that the practice is generally compatible with the view adopted in the doctrine.[79] In the *North Atlantic Coast Fisheries* Arbitration the British Government contended that rights of the United States in respect of fisheries, by virtue of the Treaty of 1783, had been abrogated as a consequence of the war of 1812. The Court did not share this view and stated that: "International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it."[80]

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[78] McNair, *Law of Treaties*, (footnote 66 above) pp. 704-715.

[79] H.J. Tobin, *The Termination of Multipartite Treaties* (New York: Columbia University Press, 1933), pp. 137 *et seq.*

[80] The North Atlantic Coast Fisheries Case (Great Britain, United States), award dated 7 September 1910, UNRIAA, vol. XI, p. 167; award dated 7 September 1910, at p. 181. See also Parry, *British Digest*, vol. 2B, 1967, pp. 585-605.

(15) Similarly, *In re Meyer's Estate*, an appellate court in the United States of America addressing the permanence of treaties dealing with territory held that "[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the Government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war …".[81]

(16) The writers recognizing this proposition include Hall,[82] Hurst,[83] Oppenheim,[84] Fitzmaurice,[85] McNair,[86] Rousseau,[87] Guggenheim,[88] Daillier and Pellet,[89] Aust,[90] Tobin,[91] Delbrück,[92] Stone[93] and Curti Gialdino.[94]

(17) The resort to this category does, however, generate certain problems. In particular, treaties of cession and other treaties effecting permanent territorial dispositions create permanent rights. As Hurst points out: "It is the acquired rights which flow from the treaties

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[81] 107 Cal. App. 2d 799, 805 (1981).

[82] William Edward Hall, *A Treatise on International Law*, edited by A. Pearce Higgins, (Clarendon: Oxford University Press, Humphrey Milford Publisher to the University, 1924) (eighth edition), pp. 456 and 457.

[83] Cecil J.B. Hurst, "Effect of War on Treaties" *BYbIL*, vol. 2 (1921-1922), pp. 37-47.

[84] Lassa Oppenheim (H. Lauterpacht (ed.)) *International Law*, vol. II (London: Longmans, Green & Co., 1948), 7th ed., p. 304.

[85] G.G. Fitzmaurice, "The Juridical clauses of the peace treaties", *Recueil des cours …*, vol. 73 (1948-II), pp. 312 and 313.

[86] McNair, *Law of Treaties*, (footnote 66 above), pp. 704-710 and 720.

[87] Charles Rousseau, *Droit international public*, Tome I (Paris: Sirey, 1970), p. 223.

[88] Paul Guggenheim, *Traité de droit international public*, Tome I (Genève: Librairie de l'Université 1967), (2nd edition) pp. 241 and 242.

[89] Patrick Daillier and Alain Pellet, *Droit international public* (Paris: L.G.D.J. 2003), 7th ed. p. 309.

[90] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), p. 244.

[91] Tobin, *The Termination of Multipartite Treaties*, (footnote 79 above), pp. 50-69.

[92] Jost Delbrück, "War Effect on Treaties", in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, 2000, p. 1370.

[93] Julius Stone, *Legal Controls of International Conflict* (New York: Rinehart & Company, 1959), revised edition, p. 448.

[94] Agostino Curti Gialdino, *Gli Effetti della Guerra sui Trattati* (Milan: Dott. A. Giuffrè, 1959), pp. 240 and 245.

which are permanent, not the treaties themselves."[95] Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict between the parties.

(18) A further source of difficulty derives from the fact that the limits of the category are to some extent uncertain. For example, in the case of the use of treaties of guarantee, which is an extensive subject,[96] it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a permanent state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair observes, "the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status".[97]

(19) A number of writers would include agreements relating to the grant of reciprocal rights to nationals and acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations leading to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from treaties concerning cessions of territory and boundaries. Accordingly such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties is examined below.

(20) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties. Article 62, paragraph 2 (a) of the Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Such treaties were recognized as an exception to the rule because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions.[98] Similarly, the

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[95] Hurst, "Effect of War on Treaties", (footnote 83 above) at p. 46. See also Fitzmaurice, "The Juridical clauses of the peace treaties", (footnote 85 above), pp. 313, 314 and 317.

[96] See Verzijl, *International Law in Historical Perspective*, (footnote 75 above), pp. 457-459; Tobin, (footnote 79 above) 1933, pp. 55-69; Georg Ress, "Guarantee Treaties", Bernhardt (ed.), *Encyclopedia*, vol. 2, pp. 934-937; McNair, (footnote 66 above), pp. 239-254.

[97] McNair, (footnote 66 above), p. 703.

[98] Paragraph (11) of the Commission's commentary to draft article 59 [now article 62 of the Vienna Convention] (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, p. 79).

Vienna Convention on Succession of States in Respect of Treaties reaches a similar conclusion about the resilience of boundary treaties, providing in article 11, that "[a] succession of States does not as such affect a boundary established by a treaty, or (b) obligations and rights established by a treaty and relating to the regime of a boundary …"[99] Although these examples are not directly relevant to the question of the effects of armed conflict on treaties, they nevertheless point to the special status attached to these types of regime.

(c) *Treaties of friendship, commerce and navigation and analogous agreements concerning private rights*

(21) Such treaties form a very important class of international transactions and are the precursors of the more recent bilateral investment treaties. The nomenclature is varied and such treaties are often denominated treaties of establishment or treaties of amity. They should not be confused with ordinary commercial treaties. A respectable consortium of writers refers to treaties of friendship, commerce and navigation (or establishment) as treaties which are not terminated as the result of armed conflict. The writers include Hurst,[100] Tobin,[101] McNair,[102] Fitzmaurice,[103] and Verzijl.[104]

(22) This class of treaties includes other treaties concerned with the grant of reciprocal rights to nationals resident on the territory of the respective parties, including rights of acquisition of

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The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties.

[99] Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

[100] Hurst, (footnote 83 above), pp. 43 and 44.

[101] Tobin, (footnote 79 above), pp. 82-87.

[102] McNair, (footnote 66 above), pp. 713-715, 718 and 719.

[103] Fitzmaurice, (footnote 85 above), pp. 314 and 315.

[104] Verzijl, (footnote 75 above), pp. 382-385. See also Memorandum by the Secretariat (A/CN.4/550, paras. 37-46). The Memorandum notes, at para. 46 that there is a very significant line of cases in the United States of America, supported by case law in Great Britain, that reciprocal inheritance treaties continue to apply during armed conflict. This jurisprudence is consistent with the general thesis among many courts and commentators that treaties consistent with national policy during armed conflict should be upheld, since the treaties in question concern only private rights. But, the French Court of Cassation has come to the opposite conclusion, leaving this an unsettled area of international law.

property, rights of transfer of such property and rights to acquire it by inheritance.[105] Associated with the class are agreements concerning the acquisition and loss of nationality, and other matters of status including marriage and guardianship.[106]

(23) The policy basis for according a special status to this category of treaties is essentially that of legal security for the nationals and other private interests involved, coupled with the condition of reciprocity. It is therefore not surprising that there is a quantity of State practice confirming the position that such treaties are not terminated in case of an armed conflict.

(24) In 1931 the Swiss Federal Department of Justice and Police, did not accept that treaties of establishment and commerce could be abrogated or suspended as between a belligerent and a neutral State.[107] The position of the British Government was opposed to the Swiss position in the pertinent negotiations. The practice of the United States was influenced by certain judicial decisions. The change in United States practice to the effect that a treaty remains in effect despite the outbreak of war is reflected in a 1945 letter from the Acting Secretary of State (Grew) to the Attorney General.[108]

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[105] See McNair, (footnote 66 above), p. 711; Fitzmaurice, (footnote 85 above), p. 315; Verzijl, (footnote 75 above), VI, pp. 382-385; Secretariat Memorandum, paras. 37-46, 67 and 76; Oppenheim, (footnote 84 above), p. 304.

[106] See McNair, (footnote 66 above), p. 714; and Verzijl, (footnote 75 above), p. 385.

[107] *Répertoire suisse de droit international public*, pp. 188-191.

[108] Whiteman, *Digest of International Law*, vol. XIV, pp. 495-497: It was noted:

> "In connection with litigation involving decedants' estates in which the Alien Property Custodian had vested the interests of German nationals, Attorney General Biddle inquired in 1945 whether the Department of State concurred with the position being advanced by the Department of Justice that the provisions of articles I and IV of the Treaty of Friendship, Commerce and Consular Rights of 8 December 1923, with Germany (United States Treaty Series 725; 44 United States Statutes at Large 2132; 52, League of Nations Treaty Series, 133) had not been abrogated by the war but were still effective. In Acting Secretary of State Grew's reply of 21 May 1945, to the Attorney General, it was stated:
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> > 'Article I of the Treaty covers a broad field, conferring upon nationals of each High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.
> >
> > 'It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled ... [Here follow references to and quotations from the cases *Karnuth v. United States*, 279 United States 231, 236 (1929), *Techt v. Hughes*, 229 New York 222, 240 (1920), 128 N.E. 185, 191 (1920), certiorari denied 254 United States 643 (1920), and the Sophie Rickmers, 45 Fed. 2d 413 (S.D.N.Y. 1930).]
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> " ...

(25) In 1948 the position adopted was confirmed by the Acting Legal Adviser, Jack B. Tate. In his words:[109]

> "In a letter dated 21 May 1945 from the Acting Secretary of State to the Attorney-General, the Department of State set forth its views regarding the continuation in effect of article IV

> 'Applying the principles of these decisions to article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, etc. On the other hand, there would seem to be no reason to regard article IV as not continuing to be operative despite the outbreak of war.
>
> 'A provision in a treaty with Austria-Hungary similar to article IV was held effective during war time in *Techt v. Hughes*, supra, ...
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> 'This case was followed in *State ex rel. Miner v. Reardon* [120 Kans. 614, 245, Pac. 158 (1926)] ... The Supreme Court of Nebraska came to the same conclusion in *Goos v. Brocks* [117 Neb. 750 (1929), 223 N.W. 13 (1929)], ...
>
> 'While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: ... provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" ...
>
> 'Although Secretary of State Lansing wrote on 10 September 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary ... that statement was made prior to the judicial decisions discussed herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognising greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.
>
> 'It may be observed that the courts of this country appear to have taken a position somewhat more favourable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among modern writers there appears to be a trend in favour of the view that "the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself". (Cecil Hurst, "The Effect of War on Treaties", 1921-1922 *British Year Book of International Law*, 37, 47.) See also C.C. Hyde, *International Law* (2nd ed., 1945), vol. II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties*, 29 *American Journal of International Law* Supp. (1953), 1183 *et seq.* There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt v. Hughes*, supra, it would not be unreasonable to suppose that such a provision as article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.
>
> 'In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that article IV of the Treaty of 8 December 1923, with Germany remains in effect despite the outbreak of war.'"

The Acting Secretary of State (Grew) to the Attorney General (Biddle), letter, 21 May 1945, MS. Department of State, file 740.00113 EW/4-1245.

[109] Whiteman, *Digest of International Law*, vol. XIV, pp. 502 and 503, letter dated 10 November 1948, to the Attorney-General.

of the above-mentioned treaty despite the outbreak of war. In the case of *Clark v. Allen* (1947), 91 L. Ed. 1633, 1641-1643, the Supreme Court decided that the provisions of article IV of the 1923 treaty with Germany relating to the acquisition, disposition and taxation of property remained effective during the war. The Department observes that customarily, as indicated by the decision in *Clark v. Allen* and a number of other decisions of the United States Supreme Court, the determinative factor is whether or not there is such an incompatibility between the treaty provision in question and the maintenance of a state of war as to make it clear that the provision should not be enforced.

"In connection with the property acquired in San Francisco by the German Government in 1941 for consular purposes, the relevant provisions of the 1923 treaty with Germany are those of the second paragraph of article XIX ... The Department of State is of the view that the legal effect of these provisions was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the Government of one country and situated within the territory of another country. This Government has consistently endeavoured to extend to the property of other Governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

"The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter.

" ...

"In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions of the second paragraph of article XIX of the treaty signed 8 December 1923 with Germany remain in effect despite the outbreak of war between the United States and Germany."

(26) This view is reflected in the decisions of municipal courts in several States, but the jurisprudence is by no means consistent.[110]

(27) The jurisprudence of the International Court of Justice concerning similar treaty provisions is not inimical to the legal positions presented above. However, the Court did not address the issue of the effects of armed conflict on validity or suspension in the *Nicaragua* case.[111] Moreover, the Court did not make any finding on the question of the existence or not of an "armed conflict" between the parties.[112] It is to be recalled that the United States still maintained diplomatic relations with Nicaragua, and there had been no declaration of war or of an armed conflict.

(28) The decision of the Court in the *Oil Platforms* case[113] also rested upon the assumption that the Treaty of Amity, Economic Relations, and Consular Rights of 1955 remained in force. The relevance of these decisions is affected by the fact that the Treaty of Amity had remained in force.[114] This had not been contested by the parties.

(29) In addition, it is safe to assume that the present class of treaties include bilateral investment treaties. As Aust points out, the purpose of such agreements is the mutual protection of nationals of the parties.[115]

(d) *Treaties for the protection of human rights*

(30) The literature makes very few references to the status for present purposes of treaties for the protection of human rights. This state of affairs is in fact readily explicable. Much of the relevant literature is earlier than the emergence of human rights norms in the era of the Charter

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[110] Rank, *Cornell Law Quarterly*, vol. 38 (1952-53), pp. 511-533; Whiteman, *Digest of International Law* XIV, September 1970, pp. 497-505; Verzijl, (footnote 75 above), VI, 1973, pp. 377-385.

[111] *I.C.J. Reports 1984*, p. 393 at pp. 426-429.

[112] Secretariat Memorandum, paras. 69-74.

[113] Judgment of 6 November 2003. See also the judgment on *Case Concerning Oil Platforms* (Preliminary Objection), *I.C.J. Reports 1996*, p. 803.

[114] See the judgment on the preliminary objection, *I.C.J. Reports 1996*, para. 15.

[115] See Aust, (footnote 90 above), p. 244.

of the United Nations. Furthermore, the specialist literature on human rights has a tendency to neglect the more technical problems. The resolution of the Institute of International Law adopted in 1985 included the following provision (in article 4):

> "The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."

Article 4 was adopted by 36 votes to none, with 2 abstentions.[116]

(31) The use of the category of human rights protection may be seen as a natural extension of the status accorded to treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

(32) The application of human rights treaties in time of armed conflict is described as follows:

> "Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply during armed conflict. First, the International Court of Justice stated in its *Nuclear Weapons* Advisory Opinion that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. The *Nuclear Weapons* opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that although the inherent right to self-defence may justify non-performance of certain

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[116] *Annuaire de l'Institut de droit international*, vol. 61 (II), pp. 219-221.

treaties, 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct'. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict. Because non-derogable human rights provisions codify *jus cogens* norms, the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in the previous section that treaty provisions representing *jus cogens* norms must be honoured notwithstanding the outbreak of armed conflict." [117]

(33) This description illustrates the problems relating to the applicability of human rights standards in case of armed conflict.[118] The task of the Commission is not to enter upon such matters of substance but to direct attention to the question of the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate, because derogability concerns the operation of the provisions and is not related to the issue of validity or termination. However, the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such does not result in suspension or termination. At the end of the day the appropriate criteria are those laid down in draft article 4. The exercise (or not) of a competence to derogate would not prevent another party to the treaty asserting that a suspension or termination was justified *ab extra*.

(e) *Treaties relating to the protection of the environment*

(34) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the protection of the environment are extremely varied.[119]

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[117] Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 32 (footnotes omitted).

[118] See, further, Rene Prévost, *International Human Rights and Humanitarian Law*, 2002.

[119] Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003), 2nd ed., pp. 307-316; Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002), 2nd ed., pp. 148-151; K. Mollard-Bannelier, La Protection de l'environnement en temps de conflit armé (Paris: Pedone, 2001).

(35) The pleadings relating to the Advisory Opinion of the International Court of Justice on nuclear weapons indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.[120]

(36) In the *Nuclear Weapons* Advisory Opinion the International Court formulated the general legal position in these terms:

> "29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
>
> "30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> "The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

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[120] See the Secretariat Memorandum, (A/CN.4/550 and Corr.1) paras. 58-63.

"This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'

"31. The Court notes furthermore that articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

"These are powerful constraints for all the States having subscribed to these provisions."[121]

(37) These prescriptions are, of course, significant and they provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict. However, as the written submissions in the Advisory Opinion proceedings indicate, there was no consensus on the specific legal question.[122]

(f) *Treaties relating to international watercourses and related installations and facilities*

(38) Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine this group separately. A number of authorities recognize

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[121] *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, paras. 29-31.

[122] See D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court", *BYbIL*, vol. 68 (1997), pp. 183 and 184.

this type of instrument as being unqualified for termination in time of an armed conflict. Such writers include Tobin,[123] McNair,[124] Fitzmaurice,[125] Rank,[126] Chinkin,[127] and Delbrück.[128]

(39) The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:[129]

> "Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives on the restoration of peace."

(40) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.[130]

(41) In any event, the regime of individual straits and canals is usually dealt with by means of specific provisions. The examples of such treaties include the Convention Instituting the Statute of Navigation of the Elbe (1922),[131] the provisions of the Treaty of Versailles relating to the

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[123] Tobin, (footnote 79 above), pp. 89-95.

[124] McNair, (footnote 66 above), p. 720.

[125] Fitzmaurice, (footnote 85 above), pp. 316 and 317.

[126] Rank, (footnote 110 above), pp. 326 and 327.

[127] Christine M. Chinkin, "Crisis and the Performance of International Agreements: The Outbreak of War in Perspective", *Yale Journal of World Public Order*, vol. 7 (1980-1981), pp. 202-205.

[128] Delbrück, "War Effect on Treaties", (footnote 92 above), p. 1370.

[129] Fitzmaurice, (footnote 85 above), p. 316.

[130] See R.R. Baxter, *The Law of International Waterways, with particular regard to Interoceanic Canals* (Cambridge, Mass: Harvard University Press, 1964), p. 205.

[131] League of Nations *Treaty Series*, vol. 26, pp. 221, 241.

Kiel Canal (1919),[132] the Convention regarding the Regime of the Straits (Montreux) (1936),[133] the Panama Canal Treaty (1977)[134] and the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (1977).[135]

(42) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the Statute on the Regime of Navigable Waterways of International Concern (1922)[136] provides that:

> "This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

(43) The Convention on the Law of the Non-navigational Uses of International Watercourses (1997)[137] provides as follows in article 29:

> "*International watercourses and installations in time of armed conflict*
>
> "International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

(44) There is therefore a case for including the present category in the indicative list.

(g) *Treaties relating to aquifers and related installations and facilities*

(45) Similar considerations as above would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent of the

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[132] *British and Foreign State Papers*, vol. 112 (1919).

[133] League of Nations *Treaty Series*, vol. 173, p. 213.

[134] *ILM*, vol. 36 (1977), p. 1022.

[135] *Ibid.*, p. 1040.

[136] League of Nations *Treaty Series*, vol. 7, pp. 37, 61.

[137] *ILM*, vol. 36 (1977), p. 700.

world's fresh water resources, excluding water locked in the polar ice.[138] While there is considerable State practice regarding surface water resources the same may not be said with regard to groundwater resources. In its work on the law of transboundary aquifers the Commission has demonstrated what is achievable in this area.[139] The existing body of bilateral, regional and international agreements and arrangements on groundwaters is becoming noticeable.[140]

(46) Based on the underlying protections provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.[141]

(47) Although the law of armed conflict itself provides protection, it may not be so clear that there is a necessary implication from the subject matter of treaties relating to aquifers and related installations and facilities that no effect ensues from an armed conflict. The vulnerability of aquifers and the need to protect the waters contained therein make a compelling case for drawing the necessary implication of continuance.

(h) *Multilateral law-making treaties*

(48) The category of law-making treaties is defined by McNair as follows:[142]

> "(i) *Multi-partite law-making treaties*
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> By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system. It is believed that these treaties survive a war, whether all the contracting

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[138] See S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments* (FAO/UNESCO, 2005), foreword.

[139] See Chap. IV of the present report.

[140] See generally, Burchi and Mechlem (footnote 138 above).

[141] See article 18 of the draft articles of the law of transboundary aquifers adopted by the Commission, at its current sixtieth session.

[142] McNair, (footnote 66 above), p. 723.

> parties or only some of them are belligerent. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 for the Limitation of the Employment of Force for the Recovery of Contract Debts and the Peace Pact of Paris of 1928 are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, etc., would probably belong to the same category."

(49) The significance of this category is indicated in several other authorities, including Rousseau,[143] Fitzmaurice,[144] Starke,[145] Delbrück[146] and Curti Gialdino.[147]

(50) The term "law-making" is somewhat problematic[148] and may not lend itself to definitive contours. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements resulting from the Second World War. Starke states, "Multilateral Conventions of the 'law making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application."[149]

(51) The United States position is described in a letter dated 29 January 1948 from the State Department Legal Adviser, Ernest A. Gross:[150]

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[143] Rousseau, (footnote 87 above), pp. 223 and 224.

[144] Fitzmaurice, (footnote 85 above), pp. 308, 309 and 313.

[145] I.A. Shearer, *Starke's International Law* (London: Butterworths, 1994) (11th ed.), p. 493.

[146] Delbrück, (footnote 92 above), p. 1370.

[147] Curti Gialdino, (footnote 94 above), 1959, pp. 225-239.

[148] See Secretariat Memorandum, (A/CN.4/550 and Corr.1) paras. 49-50.

[149] Starke, (footnote 145 above), at 409.

[150] See Rank, (footnote 110 above), p. 343.

> "With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realised that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.
>
> "It is considered by this Government that, with the coming into force on 15 September 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ..."

(52) The British position was reported in a letter from the Foreign Office dated 7 January 1948 as follows:[151]

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[151] *Ibid.*, p. 346. See also Fitzmaurice, (footnote 85 above), pp. 308-309. See also Oppenheim, (footnote 84 above), pp. 304-306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes:

> "The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bilateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bilateral treaties.
>
> "This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the peace treaties and to leave the matter to rest on the basic rules of

"I am replying ... to your letter ... in which you enquired about the legal status of multilateral treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.

"You will observe that, in the peace treaties with Italy, Finland, Roumania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to international law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 and various postal and telegraphic conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions insofar as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

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international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the peace treaties."

> "As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice."

(53) The position of the German,[152] Italian,[153] and Swiss[154] Governments appears to be essentially similar in relation to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice and, especially more current practice, is needed.

(54) In this particular context the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts depend upon the explicit guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the municipal jurisprudence is not inimical to the principle of survival.[155] The general principle was supported in the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976).[156]

(55) Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties having the status of survival. As a matter of principle they should qualify and there is a not inconsiderable quantity of State practice favourable to the principle of survival.

(i) *Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice*

(56) This category is not prominent in the literature and is probably assumed to be merged to some extent in the category of multilateral treaties constituting an international regime. Certain

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[152] *Ibid.*, pp. 349-354.

[153] *Ibid.*, pp. 347 and 348.

[154] See *Répertoire suisse de droit international public*, pp. 186-191.

[155] Rank, (footnote 110 above), pp. 511 and 533, Verzijl, (footnote 75 above), VI, pp. 387-391.

[156] *ILR*, vol. 74, p. 559 at p. 564.

writers, however, give explicit recognition of the continuing operation of treaties constituting machinery for the peaceful settlement of international disputes.[157] In accordance with this principle, special agreements concluded before the First World War were acted upon to effect the arbitrations concerned after the war.

(j) *Treaties relating to commercial arbitration*

(57) As a matter of principle and sound policy the principle of survival would seem to apply to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport v. Scottish Mechanical Light Industries Ltd.*, the Scottish Court of Session held that such treaties had survived the Second World War and were not covered by the Romanian Peace Treaty of 1947.[158] The agreements concerned were the Protocol on Arbitration Clauses signed on 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards dated 26 September 1927. The Court classified the instruments as "multipartite law-making treaties". In 1971 the Italian Court of Cassation (Joint Session) held that the 1923 Protocol on Arbitration Clauses in commercial matters had not been terminated in spite of the Italian declaration of war on France, its operation having only been suspended pending cessation of the state of war.[159]

(58) The recognition of this family of treaties would seem to be justified and there are also links with other classes of treaty, including multilateral law-making treaties.

(59) There is a significant analogy with the question of the effect of an outbreak of hostilities upon a clause providing for arbitration under the rules of the International Chamber of Commerce. In the case of *Dalmia Cement Ltd. v. National Bank of Pakistan* the Sole Arbitrator, Professor Pierre Lalive, referring to the hostilities which took place between India and Pakistan in September 1965, made the following determination:

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[157] See Stuart Hull McIntyre, *Legal Effect of World War II on Treaties of the United States* (The Hague: Martinus Nijhoff, 1958), pp. 74-86; and McNair, (footnote 66 above), p. 720. See also Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942* (New York: The Macmillan Company, 1943).

[158] *ILR*, vol. 74, p. 559, at p. 564.

[159] *Lanificio Branditex v. Società Azais e Vidal*, ibid., vol. 71, p. 595. See also the Swiss decision concerning the Protocol on Arbitration Clauses: *Telefunken v. N.V. Philips*, *ILR*, vol. 19, p. 557 (Federal Tribunal).

"68. To conclude, there is no doubt in my mind that, when the Claimant filed with the Court of Arbitration of the ICC a request for arbitration, there was in existence between the parties a valid and binding agreement to arbitrate under the ICC rules, even assuming that there had been a state of war between India and Pakistan."[160]

(k) *Treaties relating to diplomatic relations*

(60) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any case the express provisions of the Vienna Convention on Diplomatic Relations indicate its application in time of armed conflict. Thus article 24 provides that the archives and documents of the mission shall be inviolable "at any time", and this phrase was added during the Vienna Conference in order to make clear that inviolability continued in the event of armed conflict.[161] Other provisions, for example article 44, on facilities for departure, include the words "even in case of armed conflict". Article 45 is of particular interest and provides as follows:

> "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> "(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

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[160] *ILR*, vol. 67, p. 611 at p. 629; award of 18 December 1967. He also said:

> "It is unnecessary to examine, then, whether submitting to arbitration does involve 'intercourse' with an 'enemy' and whether the authorities quoted to support this contention are relevant only to 'English' or local arbitrations but also to international arbitrations under the ICC rules. It would be equally superfluous to discuss the question whether the parties did, or could contemplate, when accepting the arbitration clause, the possibility that a 'state of war' or of an armed conflict short of war could or would arise between Pakistan and India.
>
> "For these reasons,
>
> "The undersigned Arbitrator
>
> "Finds that the arbitration proceedings instituted by the Claimant come within the competence of the Arbitration Court of the International Chamber of Commerce and that the Arbitrator has jurisdiction to adjudicate upon the dispute in conformity with article 13 (3) of the Rules of Conciliation and Arbitration of the ICC."

[161] See Eileen Denza, Diplomatic Law, A Commentary on the Vienna Convention on Diplomatic Relations (Oxford: Clarendon Press, 1998), 2nd ed., p. 160.

"(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

"(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State."

(61) The principle of survival is recognized by some commentators.[162] The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:[163]

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of articles 44 and 45 of the Convention of 1961. (Cf. also articles 26 and 27 of the Convention of 1963.) Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."

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[162] See for example Chinkin, (footnote 127 above), p. 177 at pp. 194-195. See also Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

[163] *I.C.J. Reports 1980*, p. 3 at p. 40, para. 86.

(62) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event the Court made it reasonably clear that the applicable law included "the applicable rules of general international law", and that the Convention constituted a codification of the law.[164]

(l) *Treaties relating to consular relations*

(63) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of war or severance of diplomatic relations.[165] The express provisions of the Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted "even in case of armed conflict". And article 27 provides that the receiving State shall, "even in case of armed conflict", respect and protect the consular premises. The principle of survival is recognized by Chinkin.[166]

(64) The International Court of Justice in the judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* gave emphasis to the special character of the two Vienna Conventions of 1961 and 1963.

(65) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included "the applicable rules of general international law".[167]

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[164] *I.C.J. Reports 1980*, p. 24, para. 45; p. 41, para. 90 and (in the *Dispositif*), p. 44, para. 95.

[165] Luke T. Lee, *Consular Law and Practice* (Oxford: Clarendon Press, 1991) 2nd ed., p. 111.

[166] Chinkin, (footnote 127 above), p. 177 at pp. 194 and 195. See also the Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

[167] *I.C.J. Reports 1980*, p. 24, para. 45; p. 41, para. 90, and (in the *Dispositif*), p. 44, para. 95.

(66) The practice of States relating to the consular provisions in bilateral treaties is not very coherent.[168] More information, and particularly upon recent practice, is needed.

Article 6

Conclusion of treaties during armed conflict

> 1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.
>
> 2. States may conclude lawful agreements involving termination or suspension of a treaty that is operative between them during situations of armed conflict.

Commentary

(1) Draft articles 6 and 7 should be read in sequence. They have been included to preserve the principle *pacta sunt servanda*; and they are in line with the basic policy of the draft articles, which seeks to ensure the legal security and continuity of treaties. These two draft articles reflect the fact that States may, in times of armed conflict, continue to have dealings with one another.

(2) Paragraph 1 of draft article 6 reflects the basic proposition that an armed conflict does not affect the capacity of a State party to that conflict to enter into treaties.

(3) While technically speaking, the provision deals with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect on the treaty itself, it was thought useful nonetheless to retain the paragraph in the draft articles. The provision was further refined to indicate the capacity "of a State Party to that conflict", so as to indicate that there may be only one State party to the armed conflict, as in situations of internal armed conflict.

(4) Paragraph 2 deals with the practice of States parties to an armed conflict expressly agreeing during the armed conflict either to suspend or to terminate a treaty which is operative between them at the time. As McNair has remarked: "There is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during

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[168] See Rank, (footnote 110 above), pp. 341-55; McIntyre, (footnote 157 above), pp. 191-199.

the war."[169] Such agreements have been concluded in practice and a number of writers have referred to pertinent episodes. Echoing McNair to some extent, Gerald Fitzmaurice observed in his Hague Lectures:

> "Again, there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power, but once concluded they are valid and binding international agreements."[170]

Article 7

Express provisions on the operation of treaties

Where a treaty expressly so provides, it shall continue to operate in situations of armed conflict.

Commentary

(1) To complement draft article 6, draft article 7 deals with the further possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that where a treaty so provides it continues to operate in situations of armed conflict.

(2) The formulation of draft article 7 focuses on the "operativeness" of the types of treaties under discussion not being affected by a conflict. Initially, the provision referred to the continuation "in force" of the treaty. Some proposals were made to refer instead to continuing to "apply" or to "operate". It was decided to settle on the latter option since it was felt that the emphasis should be placed not on whether the treaty remained in force or whether it was potentially applicable, but rather on whether it was actually operational in the context of armed conflict.

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[169] McNair, *The Law of Treaties*, (footnote 66 above), p. 696.

[170] *Recueil des Cours*, ... vol. 73 (1948, II), p. 309.

(3) Whether or not to retain the reference to the qualifier "expressly" was debated. There was a view that such a qualifier was unnecessarily limiting, since there existed treaties which, although not expressly providing therefor, continued in operation by implication. However, on balance, it was decided to retain a stricter formulation, which clearly covers only treaties containing such express provisions, and to leave treaties which by necessary implication continue in operation to be covered by the application of draft articles 4 and 5.

(4) On a strict view, this draft article may seem redundant, but it was generally recognized that such a provision was justified in the cause of expository clarity.

Article 8

Notification of termination, withdrawal or suspension

1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.

2. The notification takes effect upon receipt by the other State party or States parties.

3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal or suspension of the operation of the treaty.

Commentary

(1) Draft article 8 establishes a basic duty of notification of termination, withdrawal or suspension from the treaty. The text is based on article 65 of the Vienna Convention, albeit streamlined and adjusted to the context of armed conflict. The intention behind the draft article is to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, but not to go further. In other words, in such situations there would be a dispute that would remain unresolved, at least for the remainder of the conflict. It was recognized that it would not be feasible to maintain a fuller equivalent of article 65, as it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.

(2) In paragraph 1, the text has been aligned with the Vienna Convention, by replacing "wishing" with "intending", and then adding the words "of that intention" at the end in order to

specify what the object of the notification was. The possibility of rendering the last phrase as "of its claim" which is the language in the Vienna Convention was also a subject of discussion, but it was decided against it so as to more clearly distinguish the present procedure from that in article 65 of the Vienna Convention.

(3) On the reference to "or its depositary", there were proposals to change it to "and its depositary", or to delete the reference to "other States". However, it finally retained the text as initially proposed since it is the function of the depositary to notify the parties. Furthermore, there are treaties which do not have depositaries. Accordingly, the possibility of notifying either the States parties or the depositary needs to be provided for in paragraph 1. However, as regards the taking effect of the notification, what is important is the moment at which the other State party or States parties receive the notification, and not the moment at which the depositary receives the notification. Hence, no reference to the depositary is made in paragraph 2.

(4) On the formulation of paragraph 2, a proposal to specify that it is the "termination, suspension or withdrawal" which takes effect upon receipt of the notification was subject of consideration. However, it was decided to retain the reference only to the "notification" taking effect, since adopting the proposed amendment would have had the effect of indicating that the termination, suspension or withdrawal would take place immediately upon receipt when it is anticipated in paragraph 3 that a party to the treaty retains the right to object termination.

(5) The intention of paragraph 3 is to preserve the right that may exist under a treaty or general international law to object to the termination, suspension or withdrawal of the treaty. Hence, the objection is to the intention to terminate, suspend or withdraw, which is communicated by the notification envisaged in paragraph 1.

Article 9

Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Commentary

(1) Draft articles 9 to 11 seek to establish a modified regime modelled on articles 43 to 45 of the Vienna Convention. Draft article 9 has its roots in article 43 of the Vienna Convention. Its purpose is to preserve the requirement of the fulfilment of an obligation under general international law, where the same obligation appears in a treaty which has been terminated or suspended, or from which the State party has withdrawn, as a consequence of an armed conflict. This latter point, namely, the linkage to the armed conflict, has been added in order to put the provision into its proper context for the purposes of the present draft articles.

(2) The principle set out in this draft article seems trite as customary international law continues to apply *dehors* a treaty obligation. In its famous dictum in the *Nicaragua case*, the International Court of Justice said:

> "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[171]

Article 10

Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(*a*) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

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[171] *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application*, Judgment of 26 November 1984, *I.C.J. Reports 1984*, para. 73, see also Judge Morelli's dissenting opinion in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969* at p. 198.

Commentary

(1) Draft article 10 deals with the possibility of the separability of provisions of treaties which are affected by an armed conflict.

(2) There was a concern that the initial version of the chapeau, which was based on its counterpart in article 44 of the Vienna Convention, gave the impression that the default rule was that the entire treaty was either terminated or suspended unless there were grounds for separation of provisions. It was noted that the issue regarding the effect of armed conflict was different from that envisaged in the Vienna Convention, in the sense that there exists practice where the effect of an armed conflict on some treaties is only partial. To have it otherwise would be to suggest that the effect is always on the entire treaty. Draft article 5 therefore recognizes that the subject-matter of a treaty may involve the implication that it continues in operation during armed conflict. It was nevertheless decided to retain draft article 10, but to deal with the matter by reformulating the chapeau to no longer emphasize the pre-existence of a right in the treaty to terminate, withdraw from or suspend.

(3) Subparagraphs (a) to (c) reproduce verbatim the text of their equivalents in article 44 of the Vienna Convention.

Article 11

Loss of the right to terminate, withdraw from or suspend the operation of a treaty

A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:

(*a*) It has expressly agreed that the treaty remains in force or continues in operation; or

(*b*) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Commentary

Draft article 11 is based on the equivalent provision in the Vienna Convention, namely, article 45. This provision deals with the loss of the right to terminate, withdraw from or suspend the operation of a treaty. To provide the context of an armed conflict, an appropriate reference has been added in the chapeau.

Article 12

Resumption of suspended treaties

> The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the *indicia* referred to in draft article 4.

Commentary

(1) This draft article constitutes a further development of draft article 4, and deals with the resumption of treaties which were suspended as a consequence of an armed conflict. The indicia referred to in draft article 4 are also relevant to the application of this draft article. Thus, articles 31 and 32 of the Vienna Convention on the Law of Treaties, as well as the nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject-matter of the treaty and the number of parties to the treaty may be taken into account.

(2) The question of when a treaty is resumed should be resolved on a case-by-case basis.

Article 13

Effect of the exercise of the right to individual or collective self-defence on a treaty

> A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right.

Commentary

(1) Draft article 13 is the first of three articles, based on the relevant resolution of the Institute of International Law, adopted at the Helsinki session in 1985.[172] Draft article 13 reflects the need for a clear recognition that the draft articles did not create advantages for an aggressor State. The same policy imperative is reflected also in draft articles 14 and 15.

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[172] In particular, article 7 of the resolution of the Institute reads as follows:

> "A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor."

(2) This draft article covers the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. Such State is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right. This draft article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in draft articles 14 and 15.

Article 14

Decisions of the Security Council

> The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Commentary

(1) Draft article 14 seeks to preserve the legal effects of decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations. It has the same function as article 8 of the 1985 resolution of the Institute of International Law.[173] The Commission preferred the approach of presenting the provision in the form of a "without prejudice" clause, instead of the formulation adopted by the Institute which was cast in more affirmative terms.

(2) Some members favoured the deletion of the reference to the "provisions of Chapter VII", so as to reflect the possibility that the Council could take decisions under other chapters of the Charter. However, the reference to Chapter VII has been retained because the context of the draft articles was that of armed conflict.

(3) Under Article 103 of the Charter of the United Nations in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

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[173] Article 8 of the resolution of the Institute reads as follows:

> "A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution."

In addition to the rights and obligations contained in the Charter itself, article 103 covers duties based on binding decisions by United Nations bodies. In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in doctrine.[174]

(4) Draft article 14 leaves open the variety of questions that may be implicated as a consequence of Article 103.

Article 15

Prohibition of benefit to an aggressor State

> A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict if the effect would be to the benefit of that State.

Commentary

(1) Draft article 15 prohibits an aggressor State from benefiting from the possibility of termination, withdrawal from or suspension of a treaty as a consequence of the armed conflict it has provoked. The formulation of the provision is based on the text of article 9 of the Institute's resolution,[175] with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that the treaties dealt with are those that are terminated, withdrawn from or suspended *as a consequence* of the armed conflict in question.

(2) The title of the draft article emphasizes the fact that the provision deals less with the question of the commission of aggression, and more with the possible benefit, in terms of the termination, withdrawal from or suspension of a treaty that might be attained by an aggressor State from the armed conflict in question.

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[174] See in particular Analytical Study of the Study Group of the Commission on Fragmentation of International Law (A/CN.4/L.682, paras. 328-340).

[175] Article 9 of the resolution of the Institute reads as follows:

> "A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State."

Article 16

Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Commentary

Draft article 16 is a further "without prejudice" clause, in this case seeking to preserve the rights and duties of States arising from the laws of neutrality. This wording has been preferred to an earlier more specific reference to the "status of third States as neutrals". It was felt that the reference to "neutrals" was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The reformulation turns the provision into more of a saving clause.

Article 17

Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*:

(*a*) The agreement of the parties; or

(*b*) A material breach; or

(*c*) Supervening impossibility of performance; or

(*d*) A fundamental change of circumstances.

Commentary

(1) Draft article 17 preserves the possibility of termination, withdrawal or suspension of treaties arising out of the application of other rules of international law, in the case of the four examples listed in subparagraphs (a) to (d), by the application of the Vienna Convention, in particular articles 54 to 62. The reference to "Other" in the title is intended to indicate that these grounds are additional to those in the present draft articles. The word "*inter alia*" at the end of the chapeau seeks to clarify that subparagraphs (a) to (d) constitute an indicative list.

(2) Whilst this reservation may be said to state the obvious, it was considered that the clarification was useful. It intends to avoid the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension.

Article 18

Revival of treaty relations subsequent to an armed conflict

> The present draft articles are without prejudice to the right of States parties to an armed conflict to regulate, subsequent to the conflict, on the basis of agreement, the revival of treaties, terminated or suspended as a result of the armed conflict.

Commentary

(1) This draft article has the specific purpose of dealing with the situation in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as terminated or suspended as a consequence of an armed conflict. Specific agreements regulating the revival of such treaties are not prejudiced by the draft articles.

(2) The draft article makes clear that the right in question is the right of "States" parties to the conflict.

Annex

Indicative list of categories of treaties referred to in draft article 5

(*a*) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

(*b*) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(*c*) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(*d*) Treaties for the protection of human rights;

(*e*) Treaties relating to the protection of the environment;

(*f*) Treaties relating to international watercourses and related installations and facilities;

(*g*) Treaties relating to aquifers and related installations and facilities;

(*h*) Multilateral law-making treaties;

(*i*) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(*j*) Treaties relating to commercial arbitration;

(*k*) Treaties relating to diplomatic relations;

(*l*) Treaties relating to consular relations.

CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

67. The Commission, at its forty-fifth session (1993), decided to include the topic "The law and practice relating to reservations to treaties"[176] in its programme of work and at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.[177]

68. At the forty-seventh session (1995) following the Commission's consideration of his first report, [178] the Special Rapporteur summarized the conclusions drawn, including a change of the title of the topic to "Reservations to treaties"; the form of the results of the study to be undertaken, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[179] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. With regard to the Guide to Practice it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,[180] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its

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[176] The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

[177] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[178] A/CN.4/470 and Corr.1.

[179] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[180] See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[181]

69. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur's second report,[182] to which was annexed a draft resolution on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[183] At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[184] In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

70. From its fiftieth session (1998) to its fifty-ninth session (2007), the Commission considered 10 more reports[185] by the Special Rapporteur[186] and provisionally adopted 85 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

71. At the present session, the Commission had before it the thirteenth report of the Special Rapporteur (A/CN.4/600) on reactions to interpretative declarations. The Commission

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[181] As of 31 July 2008, 33 States and 26 international organizations had answered the questionnaire.

[182] A/CN.4/477 and Add.1.

[183] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[184] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[185] Third report (A/CN.4/491 and Corr.1 (English only), Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (A/F/R only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); Fourth report (A/CN.4/499); Fifth report (A/CN.4/508, Add.1-4); Sixth report (A/CN.4/518 and Add.1-3); Seventh report (A/CN.4/526 and Add.1-3); Eighth report (A/CN.4/535 and Add.1); Ninth report (A/CN.4/544); Tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2); Eleventh report (A/CN.4/574); and Twelfth report (A/CN.4/584).

[186] For a detailed historical presentation, see *Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257-269.

also had before it a note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" (A/CN.4/586), which had been submitted at the end of the fifty-ninth session.

72. The Commission began by considering the note of the Special Rapporteur at its 2967th meeting on 27 May 2008. It decided at that same meeting to refer the new draft guideline 2.1.9 to the Drafting Committee.

73. The Commission considered the thirteenth report of the Special Rapporteur at its 2974th to 2978th meetings, from 7 to 15 July 2008.

74. At its 2978th meeting, on 15 July 2008, the Commission decided to refer draft guidelines 2.9.1 (including the second paragraph of draft guideline 2.9.3) to 2.9.10 to the Drafting Committee, while emphasizing that draft guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the draft guidelines on conditional interpretative declarations. The Commission also hoped that the Special Rapporteur would prepare draft guidelines on the form, statement of reasons for and communication of interpretative declarations.

75. At its 2970th meeting on 3 June 2008, the Commission considered and provisionally adopted draft guidelines 2.1.6 (Procedure for communication of reservations) (as amended,[187]) 2.1.9 (Statement of reasons [for reservations]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection) and 2.7.9 (Widening of the scope of an objection to a reservation).

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[187] See A/62/10, para. 45.

76. At its 2974th meeting, on 7 July 2008, the Commission considered and provisionally adopted draft guidelines 2.6.5 (Author [of an objection]), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) and 2.8 (Forms of acceptance of reservations).

77. At its 2988th meeting on 31 July 2008, the Commission took note of draft guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.

78. At its 2991st to 2993rd meetings, on 5 and 6 August 2008, the Commission adopted the commentaries to the draft guidelines above-mentioned.

79. The text of the draft guidelines and commentaries thereto is reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his thirteenth report

80. Introducing his thirteenth report, which deals with reactions to interpretative declarations and conditional interpretative declarations, the Special Rapporteur indicated what progress had been made on the topic of reservations to treaties. The slowness of his working methods, for which he had sometimes been criticized, was in fact due to the very nature of the instrument that the Commission was elaborating (a Guide to Practice, not a draft treaty), and to a deliberate choice to encourage careful thought and extensive debate. Although the Commission itself still had a large number of guidelines to discuss and adopt, it was reasonable to suppose that the second part of the Guide to Practice might be concluded at its sixty-first session.

81. The thirteenth report, which was in fact a continuation of the twelfth report (A/CN.4/584), aimed to extend the consideration of the questions of formulation and procedure. Any line of reasoning concerning reactions to interpretative declarations must take account of two observations. The first was that the Vienna Conventions on the Law of Treaties were totally silent on the question of interpretative declarations, which had been mentioned only rarely during the *travaux préparatoires*. The second was that reservations, on the one hand, and interpretative declarations and conditional interpretative declarations as defined in guidelines 1.2 and 1.2.1, on the other, served different purposes. Consequently, the rules applicable to

reservations could not simply be transposed to cover interpretative declarations; they could, however, be looked to for inspiration, given the lack of reference to interpretative declarations in legal texts and the dearth of practice relating to them.

82. The Special Rapporteur distinguished four sorts of reactions to interpretative declarations: approval, disapproval, silence and reclassification, the latter being when the State concerned expressed the view that an interpretative declaration was in fact a reservation.

83. Explicit approval of an interpretative declaration did not raise any particular problems; an analogy could be drawn with the "subsequent agreement between the parties regarding the interpretation of the treaty" which, under article 31, paragraph 3 (a), of the Vienna Conventions, must be taken into account. Even so, approval of an interpretative declaration could not be assimilated to acceptance of a reservation inasmuch as acceptance of a reservation could render the treaty relationship binding or alter the effects of the treaty as between the author of the reservation and the author of the acceptance. The wording of draft guideline 2.9.1[188] was intended to preserve that distinction.

84. The Special Rapporteur also pointed out that, like objections to reservations, which were more frequent than cases of express acceptance, negative reactions to interpretative declarations were more frequent than expressions of approval. To reactions intended simply to indicate rejection of the interpretation proposed should be added cases in which the State or organization concerned expressed opposition by putting forward an alternative interpretation. Draft guideline 2.9.2[189] reflected those two possibilities.

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[188] Draft guideline 2.9.1 reads as follows:

> **2.9.1 Approval of an interpretative declaration**
>
> "Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

[189] Draft guideline 2.9.2 reads as follows:

> **2.9.2 Opposition to an interpretative declaration**
>
> "Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

85. At all events, reactions to interpretative declarations had different effects from those produced by reactions to reservations, if only because the former had no consequences with regard to the entry into force of the treaty or the establishment of treaty relations. The Special Rapporteur therefore preferred to use the terms "approval" and "opposition" to denote reactions to interpretative declarations, as distinct from the terms "acceptance" and "objection" employed in the case of reactions to reservations. The question of the effects of interpretative declarations and reactions to them would be taken up in the third part of the Guide to Practice.

86. Provision had also to be made for a further reaction: "reclassification", defined in draft guideline 2.9.3,[190] whereby the State or international organization indicated that a declaration presented by its author as interpretative was in fact a reservation. That relatively common practice was based on the usual criteria for distinguishing between reservations and interpretative declarations. The Special Rapporteur thus considered that the draft guideline could usefully refer to draft guidelines 1.3 to 1.3.3, leaving it to the Commission to determine how emphatic the reference should be.

87. Draft guideline 2.9.4[191] covered the time at which it was possible to react to an interpretative declaration, and who could react. As regards the question of time, the Special Rapporteur justified the proposal that a reaction could be formulated at any time not merely out of a concern for symmetry with what draft guideline 2.4.3 specified in the case of interpretative declarations themselves, but also because there were no formal rules governing such declarations, which the States or organizations concerned sometimes learned of long after they had been made. As for who could react, the possibility should be left open to all contracting

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[190] Draft guideline 2.9.3 reads as follows:

2.9.3 Reclassification of an interpretative declaration

"Reclassification" means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or organization purports to regard the declaration as a reservation and to treat it as such.

[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

[191] Draft guideline 2.9.4 reads as follows:

2.9.4 Freedom to formulate an approval, protest or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

States and organizations and all States and organizations entitled to become parties. There was no need, in his view, to apply to reactions to interpretative declarations the restriction imposed by draft guideline 2.6.5 on the author of an objection to a reservation. Whereas an objection had effects on the treaty relation, reactions to interpretative declarations were no more than indications, and there was no reason why they should be taken into consideration only once their authors had become parties to the treaty.

88. Recalling the advisory opinion given by the International Court of Justice on the *International status of South-West Africa*,[192] the Special Rapporteur emphasized that reactions to interpretative declarations were intended to produce legal effects. It was therefore important for them to be explained and to be formulated in writing so that other States or international organizations that were or might become parties to the treaty could be made aware of them. That was not, however, a legal obligation. It would be hard to justify making it so, for that would make reactions to interpretative declarations subject to stricter formal and procedural requirements than interpretative declarations themselves.

89. Any draft guidelines which the Commission decided to devote to the form of and procedure governing reactions to interpretative declarations should therefore take the form of recommendations, which was consistent with the drafting of a Guide to Practice. Draft guidelines 2.9.5,[193] 2.9.6[194] and 2.9.7[195] were put forward in that light in the thirteenth report.

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[192] "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (Advisory opinion of 11 July 1950, *I.C.J. Reports 1950*, pp. 135-136).

[193] Draft guideline 2.9.5 reads as follows:

> **2.9.5 Written form of approval, opposition and reclassification**
>
> An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

[194] Draft guideline 2.9.6 reads as follows:

> **2.9.6 Statement of reasons for approval, opposition and reclassification**
>
> Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

[195] Draft guideline 2.9.7 reads as follows:

> **2.9.7 Formulation and communication of an approval, opposition or reclassification**
>
> An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

In the Special Rapporteur's view, in the light of those guidelines the Commission should also consider whether it was necessary to remedy the absence of equivalent provisions governing interpretative declarations themselves. Among the possible ways of doing so, he suggested dealing with the matter in the commentaries, setting it aside until the second reading, or that he himself should present some draft guidelines on that question.

90. In the Special Rapporteur's view, another very important distinction was to be drawn between reactions to reservations and reactions to interpretative declarations. Under the Vienna regime, silence on the part of the States concerned was presumed to indicate acceptance of a reservation. Nothing of the sort could be inferred from silence in response to an interpretative declaration unless it was to be argued that there was an obligation - unknown in practice - on States to respond to such declarations. Draft guideline 2.9.8[196] reflected the absence of any such presumption.

91. Approval of an interpretative declaration could nevertheless result from silence on the part of States or international organizations if they could legitimately be expected expressly to voice their opposition to the interpretation put forward. The rather general wording of draft guideline 2.9.9[197] was intended to cover that eventuality without embarking on the unreasonable task of including in the Guide to Practice the entire set of rules concerning acquiescence under international law.

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[196] Draft guideline 2.9.8 reads as follows:

2.9.8 Non-presumption of approval or opposition

Neither approval of nor opposition to an interpretative declaration shall be presumed.

[197] Draft guideline 2.9.9 reads as follows:

2.9.9 Silence in response to an interpretative declaration

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

92. Last, draft guideline 2.9.10[198] dealt with reactions to conditional interpretative declarations. While the purpose of such declarations was to interpret the treaty, they purported to produce effects on treaty relations. Reactions to conditional interpretative declarations were thus more akin to acceptances of or objections to a reservation than to reactions to a simple interpretative declaration. Accordingly, draft guideline 2.9.10 referred back to sections 2.6, 2.7 and 2.8 of the Guide to Practice without qualifying the reactions concerned. The Special Rapporteur stressed that the draft guideline was being presented as a provisional solution, like all those concerning conditional interpretative declarations, and that the Commission would take a final decision on the subject once it was sure that conditional interpretative declarations had the same effects as reservations.

2. Summary of debate

(a) General comments

93. Several Commission members spoke in favour of considering interpretative declarations and reactions to them since, among other reasons a simple transposition of the regime applicable to reservations such as the Commission had settled upon in adopting draft guidelines 1.2 and 1.2.1 was not possible. Besides, interpretative declarations were especially important in practice, for instance in the case of treaties which prohibited reservations. Others argued that while, on the whole, the remarks and proposals made in the thirteenth report were persuasive, it was not clear that it was really necessary to tackle the question of reactions to interpretative declarations in a Guide to Practice devoted to reservations.

94. Several members applauded the division of possible reactions to interpretative declarations into several categories, and the choice of terms used to distinguish them from reactions to reservations. It was commented that the examples given in the thirteenth report nevertheless showed that interpretative declarations were not always easy to understand or to assign to any particular category.

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[198] Draft guideline 2.9.10 reads as follows:

> **2.9.10 Reactions to conditional interpretative declarations**
>
> Guidelines 2.6 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.

(b) Specific comments on the draft guidelines

95. Several members supported draft guideline 2.9.1 and the choice of the term "approval". Regret was expressed that the effect of approval was not specified. A reference to article 31, paragraph 3 (a), of the Vienna Conventions was also advocated.

96. Draft guideline 2.9.2 received support from several members, although doubts were expressed about the final reference to the "effect" of the interpretation being challenged, which narrowed the distinction between opposition to an interpretative declaration and objection to a reservation. Some members argued that the form in which the reasons for opposing an interpretation were stated was a matter that should be left to the State or organization concerned, not covered in a draft guideline. Others were of the view that draft guideline 2.9.2 should also cover cases in which the other parties were unwilling to accept an interpretative declaration on the grounds that it gave rise to additional obligations or expanded the scope of existing obligations.

97. On the subject of draft guideline 2.9.3, several members drew attention to the topical and specific nature of the reclassification of interpretative declarations, as for example in the case of treaties on the protection of the person. Although, in practice, reclassification was often associated with an objection, there was a need for specific procedural rules to govern reclassification. Care must be taken to avoid giving the impression that a State other than the author State had the right to determine the nature of a declaration. Certainly the reclassifying State should apply the reservations regime to the reclassified declaration; but that unilateral interpretation could not prevail over the position of the State which had made the declaration. It was also emphasized that practitioners and depositaries needed guidance on the form, timing and legal effects of reactions to what might be called "disguised reservations".

98. Another view expressed was that reclassification was a particular kind of opposition, and did not need to be assigned to a special category since its consequences were no different from those of other kinds of opposition; including reclassification as one case within draft guideline 2.9.2 would suffice.

99. There was widespread support for the retention of the second paragraph in draft guideline 2.9.3, and several members also expressed a preference for the wording "apply" rather

than "take into account". But it was also argued that the paragraph was unnecessary, and that the expression "take into account" should be the one used if the paragraph was retained.

100. Several members considered that there was good reason for draft guideline 2.9.4 to allow for States and international organizations entitled to become parties to the treaty to react, as the declarations concerned would have no effect on the entry into force of the treaty.

101. It was suggested that draft guidelines 2.9.5, 2.9.6 and 2.9.7 were unnecessary. Others felt that, some editorial details notwithstanding, those draft guidelines provided useful clarifications. Several members called for the drafting of equivalent provisions to govern interpretative declarations themselves. It was pointed out that the reference in draft guideline 2.9.7 to draft guideline 2.1.6 should be deleted, since it related to a time limit that did not apply to interpretative declarations.

102. The absence of presumption set forth in draft guideline 2.9.8 won the approval of several members. Others considered the guideline unnecessary inasmuch as it added nothing to the provisions of draft guideline 2.9.9.

103. Draft guideline 2.9.9 provoked a wide-ranging discussion. Some members felt it important to emphasize that, in the case of an interpretative declaration, silence did not betoken consent since there was no obligation to react expressly to such a declaration. It was pointed out that the notion of acquiescence was apposite in treaty law, even if the circumstances in which the "conduct" referred to in article 45 of the Vienna Conventions might constitute consent could not be determined beforehand. Several members expressed the view that draft guideline 2.9.9 offered a nuanced solution and should be retained, since it gave helpful indications as to how silence should be interpreted.

104. Other members, however, called for the draft guideline to be deleted altogether, since it was very general and appeared to contradict the absence of presumption of approval or opposition set forth in draft guideline 2.9.8, the text of and commentary to which could provide all necessary clarification. At the very least, if the second paragraph of draft guideline 2.9.9 was to be retained, instances should be given of the certain specific circumstances in which a State or international organization could be considered to have acquiesced in an interpretative declaration.

105. Some members felt that, in the absence of any indication as to the "specific circumstances" in which silence on the part of the State amounted to acquiescence, the two paragraphs of the guideline might contradict each other. There was thus a need to spell out the relationship between silence and conduct. The Special Rapporteur was right to flag the role which silence could play in determining the existence of conduct amounting to acquiescence; but silence alone could not constitute acquiescence. Acquiescence depended in particular on the legitimate expectations of the States and organizations concerned and the setting in which silence occurred.

106. Another view expressed was that the draft guideline should make it clear that consent could not be inferred from the conduct of the State in question unless the State had persistently failed to react although fully aware of the implications of the interpretative declaration, as in cases when the meaning of the declaration was quite plain.

107. Lastly, it was suggested that the second paragraph of draft guideline 2.9.9 might be worded as a "without prejudice" clause. Doing so would allow the possible consequences of silence, as an element in acquiescence, to be mentioned without placing undue emphasis on acquiescence.

108. Support was expressed for the distinction drawn by the Special Rapporteur between conditional and simple interpretative declarations. Some members still voiced doubts about the relevance of the category of conditional interpretative declarations, which purported to modify the legal effects of treaty provisions and should thus be assimilated to reservations. There would thus be just two categories, interpretative declarations and reservations, conditional interpretative declarations being a special form of reservation. It was also emphasized that the classification of an act was determined by its legal effects, not by how it was described. In this connection, it was noted that also conditional interpretative declarations purporting to enlarge the scope of application of the treaty should be regarded as reservations needing to be accepted before they could produce effects.

109. Other members did not consider it prudent for the time being to draw an analogy between the regime of conditional interpretative declarations and the regime of reservations: reservations were intended to modify the legal effects of a treaty, whereas conditional declarations made participation in the treaty subject to a particular interpretation. At all events, pending a decision

by the Commission on the desirability of dealing specifically with the case of conditional interpretative declarations, the terminological precautions taken by the Special Rapporteur in draft guideline 2.9.10 were welcome.

3. Concluding remarks of the Special Rapporteur

110. The Special Rapporteur observed that his report had not aroused much opposition. Most of the comments related to the second paragraph of draft guideline 2.9.9. First, however, he wished to react to the comments made on draft guideline 2.9.10. He continued to believe that declarations as defined in draft guideline 1.2.1 which purported to impose a particular interpretation on the treaty were not reservations, since they did not seek to exclude or modify the legal effect of certain treaty provisions. The Commission had decided in 2001 not to review draft guideline 1.2.1 on the definition of conditional interpretative declarations, which were a "hybrid" category resembling both reservations and interpretative declarations. Since then, it and the Special Rapporteur had realised that the regime of conditional interpretative declarations was very similar, if not identical, to that of reservations. But the Commission was not yet ready to go back on its 2001 decision and delete the guidelines on conditional interpretative declarations, replacing them by a single guideline assimilating such declarations to reservations. It was still too early to make an unqualified pronouncement that the two regimes were absolutely identical; meanwhile the Commission had decided, if only provisionally, to adopt guidelines on conditional interpretative declarations.

111. It was in that spirit that he had suggested referring draft guideline 2.9.10 to the Drafting Committee; as with similar cases in the past, the draft guideline could be provisionally adopted, thereby confirming the Commission's cautious attitude on the matter. He had nevertheless taken note of the comment admonishing him for failing to distinguish clearly in the report between conditional and "simple" interpretative declarations, and would try to put the matter right in the relevant commentaries.

112. Turning to the various opinions expressed during the discussion, he believed that reclassification belonged in a separate category and was a different operation from opposition: it was a first step towards, but not identical to, opposition. He also favoured the expression "conditional approval" to describe some kinds of approval.

113. He observed that several members were concerned about the possible effects of approval as defined in draft guideline 2.9.1. He wished to reiterate that the effects of reservations themselves and of all declarations relating to reservations would be discussed comprehensively in the fourth part of the Guide to Practice.

114. With regard to draft guideline 2.9.3, he noted that most members who had spoken about it were in favour of keeping the second paragraph; the whole text would, consequently, be referred to the Drafting Committee.

115. Most members were also in favour of referring draft guidelines 2.9.4 to 2.9.7 to the Drafting Committee.

116. The Special Rapporteur was pleased to note that the reference in draft guideline 2.9.4 to "any State or any international organization that is entitled to become a party to the treaty" had not aroused reactions comparable to those provoked by the corresponding phrase in guideline 2.6.5, it being clear that the two cases were completely different.

117. As all the members who had spoken on the matter had asked him to prepare draft guidelines on the form of, reasons for and communication of interpretative declarations themselves, he was willing, if the Commission endorsed the idea, to do so at the current session or at the next session.

118. He pointed out that the question of silence was the thorniest problem. It was his impression that the relationship between guidelines 2.9.8 and 2.9.9 was still not very clearly understood; the second paragraph of draft guideline 2.9.9 had also been criticized.

119. To his mind, both guideline 2.9.8 and guideline 2.9.9 were necessary. The first established the principle that, in contrast to what applies with regard to reservations, acceptance of an interpretative declaration could not be presumed, while the second qualified it by saying that silence in itself did not necessarily indicate acquiescence. In certain circumstances, silence could be regarded as acquiescence. Hence the principle was not rigid: exceptions were possible.

120. Most of the criticism directed at the second paragraph of draft guideline 2.9.9 concerned the failure to identify the "specific circumstances" it mentioned. It would, however, be hard to be more explicit in a draft guideline without incorporating a long treatise on acquiescence. He drew attention to a study on the subject produced by the Secretariat in 2006.[199]

121. An attempt could be made to define those "specific circumstances", but the entire theory of acquiescence could not be expounded in a draft guideline on reservations. He would be prepared to include some concrete examples in the commentary, but he was not optimistic about finding any. If he could not, he would use hypothetical examples. But he still believed that international case law offered several instances in which a treaty had been interpreted or modified by acquiescence in the form of silence (the Eritrea-Ethiopia Boundary Commission,[200] the ICJ *Temple of Preah Vihear* case,[201] the *Taba* award,[202] the *Filleting within the Gulf of St. Lawrence* arbitral award).[203]

122. He thus agreed that silence was one aspect of conduct underlying consent. The second paragraph of draft guideline 2.9.9 could be reworked in the Drafting Committee to capture that idea more faithfully. Thought could also be given to a saving clause. He hoped that all the draft guidelines could be referred to the Drafting Committee, with due regard given to his conclusions.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

123. The text of the draft guidelines[204] provisionally adopted so far by the Commission is reproduced below.

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[199] "Acquiescence and its effects on the legal rights and obligations of States" (ILC (LVIII) WG/LT/INFORMAL/4, 20 June 2006, submitted to the Working Group on the Long-term Programme of Work of the Commission.

[200] Decision regarding the delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Permanent Court of Arbitration, UNRIAA, vol. XXV, p. 111.

[201] *I.C.J. Reports 1962*, p. 40.

[202] Case concerning the location of boundary markers in Taba between Egypt and Israel, UNRIAA, vol. XX, p. 1.

[203] Filleting within the Gulf of St. Lawrence between Canada and France, UNRIAA, vol. XIX, p. 225.

[204] At its 2991st meeting, on 5 August 2008, the Commission decided that, while the expression "draft guidelines" would continue to be used in the title, the text of the report would simply refer to "guidelines". This decision is purely editorial and is without prejudice to the legal status of the draft guidelines adopted by the Commission.

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note[205]

Some guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[206]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4][207] Object of reservations[208]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[209]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

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[205] For the commentary see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[206] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[207] The number between square brackets indicates the number of this guideline in the report of the Special Rapporteur or, as the case may be, the original number of a guideline in the report of the Special Rapporteur which has been merged with the final guideline.

[208] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[209] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

1.1.3 [1.1.8] Reservations having territorial scope[210]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[211]

A unilateral statement by which a State purports to exclude or to modify the legal effect o certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[212]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[213]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or tha organization purports to discharge an obligation pursuant to the treaty in a manner different fron but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[214]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[215]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

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[210] For the commentary to this guideline, see *ibid.*, pp. 206-209.

[211] For the commentary to this guideline, see *ibid.*, pp. 209-210.

[212] For the commentary to this guideline, see *ibid.*, *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221

[213] For the commentary to this guideline, see *ibid.*, pp. 222-223.

[214] For the commentary to this guideline, see *ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[215] For the commentary to this guideline, see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

1.2 Definition of interpretative declarations[216]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[217]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[218]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[219]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[220]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

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[216] For the commentary to this guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[217] For the commentary to this guideline, see *ibid.*, pp. 240-249.

[218] For the commentary to this guideline, see *ibid.*, pp. 249-252.

[219] For the commentary to this guideline, see *ibid.*, pp. 252-253.

[220] For the commentary to this guideline, see *ibid.*, pp. 254-260.

1.3.2 [1.2.2] Phrasing and name[221]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[222]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[223]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[224]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[225]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[226]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

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[221] For the commentary to this guideline, see *ibid.*, pp. 260-266.

[222] For the commentary to this guideline, see *ibid.*, pp. 266-268.

[223] For the commentary to this guideline, see *ibid.*, pp. 268-270.

[224] For the commentary to this guideline, see *ibid.*, pp. 270-273.

[225] For the commentary to this guideline, see *ibid.*, pp. 273-274.

[226] For the commentary to this guideline, see *ibid.*, pp. 275-280.

1.4.4 [1.2.5] General statements of policy[227]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[228]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause[229]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[230]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[231]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[232]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

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[227] For the commentary to this guideline, see *ibid.*, pp. 280-284.

[228] For the commentary to this guideline, see *ibid.*, pp. 284-289.

[229] For the commentary to this guideline, see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[230] For the commentary to this guideline, see *ibid.*, pp. 247-252.

[231] For the commentary, see *ibid.*, *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[232] For the commentary to this guideline, see *ibid.*, pp. 290-302.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[233]

Guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[234]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[235]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[236]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[237]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

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[233] For the commentary to this guideline, see *ibid.*, pp. 302-306.

[234] For the commentary to this guideline, see *ibid.*, pp. 306-307.

[235] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 356-359.

[236] For the commentary see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[237] For the commentary to this guideline, see *ibid.*, pp. 253-269.

1.7.2 [1.7.5] Alternatives to interpretative declarations[238]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[239]

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation[240]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[241]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

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[238] For the commentary to this guideline, see *ibid.*, pp. 270-272.

[239] For the commentary to this guideline, see *ibid.*, *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

[240] For the commentary to this guideline, see *ibid.*, pp. 67-69.

[241] For the commentary to this guideline, see *ibid.*, pp. 69-75.

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[242]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[243]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[244]

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

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[242] For the commentary to this guideline, see *ibid.*, pp. 75-79.

[243] For the commentary to this guideline, see *ibid.*, pp. 80-93.

[244] For the commentary see section C.2 below.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[245]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 *bis*] Procedure in case of manifestly invalid reservations[246]

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.1.9 Statement of reasons[247]

A reservation should to the extent possible indicate the reasons why it is being made.

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[245] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112.

[246] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 359-361.

[247] For the commentary see section C.2 below.

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty[248]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[249]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[250]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ...[251]

2.3 Late reservations

2.3.1 Late formulation of a reservation[252]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[253]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

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[248] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

[249] For the commentary to this guideline, see *ibid.*, pp. 472-474.

[250] For the commentary to this guideline, see *ibid.*, pp. 474-477.

[251] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[252] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477-489.

[253] For the commentary to this guideline, see *ibid.*, pp. 490-493.

2.3.3 Objection to late formulation of a reservation[254]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[255]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

2.3.5 Widening of the scope of a reservation[256]

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations[257]

2.4.1 Formulation of interpretative declarations[258]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level[259]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

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[254] For the commentary to this guideline, see *ibid.*, pp. 493-495.

[255] For the commentary to this guideline, see *ibid.*, pp. 495-499.

[256] For the commentary see *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269-274.

[257] For the commentary see *ibid.*, *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[258] For the commentary to this guideline, see *ibid.*, pp. 115-116.

[259] For the commentary to this guideline, see *ibid.*, pp. 117-118.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[260]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[261]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[262]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[263]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[264]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

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[260] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

[261] For the commentary to this guideline, see *ibid.*, pp. 501-502.

[262] For the commentary to this guideline, see *ibid.*, pp. 502-503.

[263] For the commentary to this guideline, see *ibid.*, pp. 503-505.

[264] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

2.4.8 Late formulation of a conditional interpretative declaration[265]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2.4.9 Modification of an interpretative declaration[266]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[267]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[268]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of withdrawal[269]

The withdrawal of a reservation must be formulated in writing.

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[265] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new guidelines at the fifty-fourth session.

[266] For the commentary see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277.

[267] For the commentary see *ibid.*, pp. 277-278.

[268] For the commentary to this guideline, see *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

[269] For the commentary to this guideline, see *ibid.*, pp. 201-207.

2.5.3 Periodic review of the usefulness of reservations[270]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[271]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[272]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

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[270] For the commentary to this guideline, see *ibid*., pp. 207-209.

[271] For the commentary to this guideline, see *ibid*., pp. 210-218.

[272] For the commentary to this guideline, see *ibid*., pp. 219-221.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[273]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[274]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[275]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses

A. Deferment of the effective date of the withdrawal of a reservation[276]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

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[273] For the commentary to this guideline, see *ibid.*, pp. 221-226.

[274] For the commentary to this guideline, see *ibid.*, pp. 227-231.

[275] For the commentary to this guideline, see *ibid.*, pp. 231-239.

[276] For the commentary to this model clause, see *ibid.*, p. 211.

B. Earlier effective date of withdrawal of a reservation[277]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[278]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[279]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[280]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[281]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

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[277] For the commentary to this model clause, see *ibid*., pp. 211 and 212.

[278] For the commentary to this model clause, see *ibid*., p. 212.

[279] For the commentary to this guideline, see *ibid*., pp. 213-215.

[280] For the commentary to this guideline, see *ibid*., pp. 215-225.

[281] For the commentary to this guideline, see *ibid*., pp. 226-228.

2.5.12 Withdrawal of an interpretative declaration[282]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.5.13 Withdrawal of a conditional interpretative declaration[283]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6 Formulation of objections

2.6.1 Definition of objections to reservations[284]

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[285]

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

2.6.3, 2.6.4[286]

2.6.5 Author[287]

An objection to a reservation may be formulated by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

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[282] For the commentary to this guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 281 and 282.

[283] For the commentary to this guideline, see *ibid.*, pp. 282 and 283.

[284] For the commentary see *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 184-199.

[285] For the commentary see *ibid.*, pp. 199 and 200.

[286] The Drafting Group decided to defer consideration of these two guidelines.

[287] For the commentary see section C.2 below.

2.6.6 Joint formulation[288]

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written form[289]

An objection must be formulated in writing.

2.6.8 Expression of intention to preclude the entry into force of the treaty[290]

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the formulation of objections[291]

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.10 Statement of reasons[292]

An objection should to the extent possible indicate the reasons why it is being made.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation[293]

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty[294]

An objection formulated prior to the expression of consent to be bound by the treaty, does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

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[288] For the commentary see section C.2 below.

[289] For the commentary see section C.2 below.

[290] For the commentary see section C.2 below.

[291] For the commentary see section C.2 below.

[292] For the commentary see section C.2 below.

[293] For the commentary see section C.2 below.

[294] For the commentary see section C.2 below.

2.6.13 Time period for formulating an objection[295]

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.14 Conditional objections[296]

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.15 Late objections[297]

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations[298]

2.7.1 Withdrawal of objections to reservations[299]

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations[300]

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations[301]

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection[302]

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

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[295] For the commentary see section C.2 below.

[296] For the commentary see section C.2 below.

[297] For the commentary see section C.2 below.

[298] For the commentary see section C.2 below.

[299] For the commentary see section C.2 below.

[300] For the commentary see section C.2 below.

[301] For the commentary see section C.2 below.

[302] For the commentary see section C.2 below.

2.7.5 Effective date of withdrawal of an objection[303]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation[304]

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial withdrawal of an objection[305]

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection[306]

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation[307]

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

2.8 Forms of acceptance of reservations[308]

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

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[303] For the commentary see section C.2 below.

[304] For the commentary see section C.2 below.

[305] For the commentary see section C.2 below.

[306] For the commentary see section C.2 below.

[307] For the commentary see section C.2 below.

[308] For the commentary see section C.2 below.

3. Validity of reservations and interpretative declarations

3.1 Permissible reservations[309]

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations expressly prohibited by the treaty[310]

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations[311]

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 Permissibility of reservations not prohibited by the treaty[312]

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

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[309] For the commentary see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 327-333.

[310] For the commentary see *ibid.*, pp. 333-340.

[311] For the commentary see *ibid.*, pp. 340-350.

[312] For the commentary see *ibid.*, pp. 350-354.

3.1.4 Permissibility of specified reservations[313]

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty[314]

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.6 Determination of the object and purpose of the treaty[315]

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

3.1.7 Vague or general reservations[316]

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.8 Reservations to a provision reflecting a customary norm[317]

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 Reservations contrary to a rule of *jus cogens*[318]

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

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[313] For the commentary see *ibid.*, pp. 354-356.

[314] For the commentary see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 66-77.

[315] For the commentary see *ibid.*, pp. 77-82.

[316] For the commentary see *ibid.*, pp. 82-88.

[317] For the commentary see *ibid.*, pp. 89-98.

[318] For the commentary see *ibid.*, pp. 99-104.

3.1.10 Reservations to provisions relating to non-derogable rights[319]

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations relating to internal law[320]

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

3.1.12 Reservations to general human rights treaties[321]

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty[322]

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(ii) The reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

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[319] For the commentary see *ibid.*, pp. 104-109.

[320] For the commentary see *ibid.*, pp. 109-113.

[321] For the commentary see *ibid.*, pp. 113-116.

[322] For the commentary see *ibid.*, pp. 117-121.

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its sixtieth session

124. The text of the draft guidelines with commentaries thereto adopted by the Commission at its sixtieth session is reproduced below.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations*

Unless otherwise provided in the treaty or agreed by the contracting States and contracting international organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting international organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

Commentary

(1) As in the two that follow, guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in guideline 2.1.5. It covers two different but closely linked aspects:

The author of the communication; and

The practical modalities of the communication.

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* This guideline and the commentary thereto were adopted by the Commission in 2002 (see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 93-104). At its fifty-ninth session, however, the Commission decided, in accordance with a suggestion to that effect by the Special Rapporteur (see *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), p. 23, para. 62), to revise the third paragraph of the guideline following its consideration of guideline 2.6.13 and to adapt the commentary accordingly. In addition, in the light of an amendment submitted by a member of the Commission in plenary meeting, the Commission decided, after a vote, to modify the chapeau of guideline 2.1.6. The commentary was also modified in consequence.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases, this will be the depositary, as shown by the provisions of article 79 of the 1986 Convention,[323] which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, in 1951, for example, the Commission believed that "the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[324] Likewise, in his fourth report in 1965, Waldock proposed that a reservation "shall be notified to the depositary or, where there is no depositary, to the other interested States".[325]

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".[326]

(5) That is the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of international organizations, in article 79 of the 1986 Convention:

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[323] Art. 78 of the 1969 Convention.

[324] Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951, *Yearbook ... 1951*, vol. II, document A/1858, para. 34, p. 130.

[325] *Yearbook ... 1965*, vol. II, p. 53.

[326] *Yearbook ... 1966*, vol. II, commentary to draft article 73, para. 1, p. 294.

"Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(*a*) If there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e)."

(6) Article 79 is indissociable from this latter provision, under which:

"1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(*e*) Informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty."

(7) It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are quite obviously entitled to become parties to the treaty and indeed become so simply by virtue of the treaty's entry into

force, in accordance with the definition of the terms given in article 2, paragraph 1 (f), of the 1986 Vienna Convention; it poses a problem, however, with regard to the wording of the guideline to be included in the Guide to Practice.

(8) Without doubt, the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But the Commission wondered whether, in preparing this guideline, the wording of these two provisions should be reproduced, or that of article 23, paragraph 1. It seemed logical to adopt the terminology used in the latter so as to avoid any ambiguity and conflict - even purely superficial - between the various guidelines of the Guide to Practice.

(9) Moreover, there can be no doubt that communications relating to reservations - especially those concerning the actual text of reservations formulated by a State or an international organization - are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (e), referred to above.[327] Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of "examining whether a signature, an instrument *or a reservation* is in conformity with the provisions of the treaty and of the present articles".[328] This expression was replaced in Vienna with a broader one - "the signature or any instrument, notification or communication relating to the treaty"[329] - which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as indicated in the Commission's commentary to draft article 73 (now article 79 of the 1986 Convention), the rule laid down in subparagraph (a) of this provision

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[327] See paragraph (6) above.

[328] *Yearbook ... 1966*, vol. II, p. 269, draft article 72, para. 1 (d) (italics added). On the substance of this provision, see the commentary to guideline 2.1.7 (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 115-123).

[329] Art. 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference, First and Second Sessions*, A/CONF.39/11/Add.2, para. 654 (iv) (4), p. 202, and para. 660 (i), p. 203).

"relates essentially to notifications and communications relating to the 'life' of the treaty - acts establishing consent, *reservations*, objections, notices regarding invalidity, termination, etc.".[330]

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.[331] They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement of 18 October 1969 establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).[332] Likewise, France submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.[333]

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.[334] It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a) of the 1986 Vienna Convention.[335] For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a guideline enshrining it.

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[330] *Yearbook ... 1966*, vol. II, p. 270, para. (2) of the commentary (italics added)

[331] See *ibid.* with regard to draft article 73 (a) (which became article 78 of the 1969 Convention and article 79 of the 1986 Convention).

[332] See *Multilateral Treaties Deposited with the Secretary-General*: *Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, p. 570, note 8 (chap. X.6).

[333] See *ibid.*, vol. II, p. 439, note 4 (chap. XXV.3).

[334] See guideline 2.1.7 (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 105.

[335] Art. 77, para. 1 (e), and art. 78 (a), respectively, of the 1969 Convention. In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (see *Multilateral Treaties ...*, vol. II, p. 439, note 4 (chap. XXV.3)). The Secretary-General's passivity in this instance is subject to criticism.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 73, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),[336] and stressed "the obvious desirability of the prompt performance of this function by a depositary".[337] This is an important issue, which is linked to subparagraphs (b) and (c) of article 78:[338] the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.[339]

(14) In practice, at the current stage of modern means of communication, depositaries, at any event in the case of international organizations, perform their tasks with great speed. Whereas in the 1980s the period between the receipt of reservations and communicating them varied from one to two and even three months, it is apparent from the information supplied to the Commission by the Treaty Section of the United Nations Office of Legal Affairs that:

> "1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.

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[336] Art. 78, para. 1 (e), of the 1986 Convention.

[337] *Yearbook ... 1966*, vol. II, para. (5) of the commentary, p. 270.

[338] Art. 79 (a) and (b) of the 1986 Convention. See the text of these provisions in paragraph (5) above.

[339] See the commentary to draft article 73 in the 1966 report of the Commission, *Yearbook ... 1966*, vol. II, pp. 270-271, paras. (3) to (6) of the commentary; see also T.O. Elias, *The Modern Law of Treaties* (Dobbs Ferry/Leiden: Oceana Publications/Sijthoff, 1974), pp. 216-217.

> 2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: http://untreaty.un.org (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[340] are sent by facsimile."[341]

(15) For its part, the International Maritime Organization (IMO) has indicated that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

(16) The practice of the Council of Europe has been described to the Commission by the Secretariat of the Council as follows:

> "The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council

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[340] These are communications relating to the Agreement of 20 March 1958 concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Treaties ...*, vol. I, p. 683).

[341] The Treaty Section has also advised: "3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification [see LA 41 TR/221 (23-1)]." See also Palitha T.B. Kohona, "Some notable developments in the practice of the UN Secretary-General as depository of multilateral treaties: reservations and declarations", *American Journal of International Law*, vol. 99 (2005), pp. 433-450, and "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33 (2005), pp. 415-450.

of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.

Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

Since our new web site (http://conventions.coe.int) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification."

(17) Lastly, it is apparent from information from the Organization of American States (OAS) that:

"Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more formal way, we notify every three months through a procès-verbal sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English."

(18) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This combines the text of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention[342] and adapts it to the special problems posed by the communication of reservations.

(19) The chapeau of the guideline reproduces the relevant parts that are common to the chapeaux of articles 78 and 79 of the 1969 and 1986 Vienna Conventions, with some simplification: the wording decided upon at Vienna to introduce article 78 ("the contracting States and contracting organizations or, as the case may be, by the contracting organizations ...") appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,[343] the text of guideline 2.1.6 reproduces, with one small difference, the formulation used in article 23, paragraph 1, of the 1986 Convention ("to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty"), in preference to that used in article 78, paragraph 1 (e) ("the parties and the States and international organizations entitled to become parties to the treaty"). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (i) and (ii). Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression "the States and organizations for which it is intended" (ii) refers to the "contracting States and contracting organizations and other States and international organizations entitled to become parties" (i). This is also true of the addition of the adjective "international", which the Commission inserted before the noun "organizations" in the chapeau of the first paragraph in order to avoid any ambiguity and to compensate for the lack, in the Guide to Practice, of a definition of the term "contracting organization" (whereas such a definition does appear in article 2, paragraph 1 (f), of the 1986 Vienna Convention); some members of the Commission, however, regretted this departure from the wording of the

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[342] Art. 77, para. 1 (e), and art. 79 of the 1969 Convention.

[343] Paragraphs (7) and (8).

Vienna Convention, which they considered unnecessary; obviously, this clarification applies to the guideline as a whole. Similarly, the subdivision of the draft's first paragraph into two separate subparagraphs probably makes it more readily understandable, without changing the meaning.

(20) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible" in subparagraph (ii) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (i): it is for the author of the reservation to assume his responsibilities in this regard.[344]

(21) In keeping with guidelines 2.1.1 and 2.1.2, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must be formal. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication - electronic mail or fax - which are less reliable than traditional methods. For this reason, a majority of the members of the Commission considered that any communication concerning reservations should be confirmed in a diplomatic note (in cases where the author is a State) or in a depositary notification (where it is from an international organization[345]). While some members held an opposite view, the Commission took the view that, in this case, the time period should start as from the time the electronic mail or facsimile is sent. This would help prevent disputes as to the date of receipt of the confirmation and would not give rise to practical problems, since, according to the indications given to the Commission, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter, at least by depositary international organizations. These clarifications are given in the third paragraph of guideline 2.1.6.

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[344] See paragraph (13) above.

[345] A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could nonetheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

(22) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[346] Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.[347]

(23) On the other hand, the second paragraph of guideline 2.1.6 reproduces the rule set out in subparagraphs (b) and (c) of article 79 of the 1986 Vienna Convention.[348] However, it seemed possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. In both cases, it is the receipt of the communication by the State or international organization for which it is intended that is decisive. It is, for example, from the date of receipt that the period within which an objection may be formulated is counted.[349] It should be noted that the date of effect of the notification may differ from one State or international organization to another depending on the date of receipt.

2.1.9 Statement of reasons

A reservation should to the extent possible indicate the reasons why it is being made.

Commentary

(1) The Commission's work on the law of treaties and the 1969 and 1986 Vienna Conventions in no way stipulate that a State or international organization which formulates a reservation must give its reasons for doing so and explain why it purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime.

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[346] Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

[347] Ministries of Foreign Affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

[348] See paragraph (5) above.

[349] Regarding objections, see guideline 2.6.13 below.

(2) However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention. In the famous *Belilos* case, the European Court of Human Rights decided that article 57 (former article 64), paragraph 2, establishes "not a purely formal requirement but a condition of substance".[350] In the Court's view, the required reasons or explanations "provide a guarantee - in particular for the other Contracting Parties and the Convention institutions - that a reservation does not go beyond the provisions expressly excluded by the State concerned".[351] The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.[352]

(3) Under general international law, such a drastic consequence certainly does not follow automatically from a failure to give reasons, but the justification for and usefulness of giving reasons for reservations, stressed by the European Court in 1988, are applicable to all treaties and all reservations. It is on this basis that the Commission deemed it useful to encourage giving reasons without making it a legal obligation to do so, an obligation which, in any case, would

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[350] *Belilos v. Switzerland* (application No. 10328/83), Judgment of 29 April 1988, *Reports of Judgments and Decisions of the European Court of Human Rights*, Series A, No. 132, para. 59.

[351] *Ibid.*

[352] *Ibid.*, para. 60.

have been incompatible with the legal character of the Guide to Practice. The non-binding formulation of the guideline, reflected in the use of the conditional, makes it clear that this formality, while desirable, is in no way a legal obligation.

(4) Giving reasons (which is thus optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other concerned States, international organizations or monitoring bodies to fulfil their responsibilities effectively. It gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated - including (but not exclusively) by indicating impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible - but also to provide information that will be useful in assessing the validity of the reservation. In this regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

(5) The reasons and explanations given by the author of a reservation also facilitate the work of the bodies with competence to assess the reservation's validity, including other concerned States or international organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and treaty monitoring bodies. Giving reasons, then, is also one of the ways in which States and international organizations making a reservation can cooperate with the other contracting parties and the monitoring bodies so that the validity of the reservation can be assessed.[353]

(6) Giving and explaining the reasons which, in the author's view, made it necessary to formulate the reservation also helps to establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This is beneficial not only for the States or international organizations which are called upon to comment on the reservation by accepting or objecting to it, but also for the author

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[353] The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, paragraph 9 of which states: "The Commission calls upon States to cooperate with monitoring bodies ..." (*Yearbook ... 1997*, vol. II, Part Two, p. 58). This obligation to cooperate was also stressed by the international human rights treaty bodies in 2007 at their sixth inter-committee meeting (see the report of the meeting of the working group on reservations (HRI/MC/2007/5, para. 16 (Recommendations), recommendation No. 9 (a)).

of the reservation, which, by giving reasons, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

(7) In practice, reasons are more likely to be given for objections than for reservations. There are, however, examples in State practice of cases in which States and international organizations have made a point of giving their reasons for formulating a particular reservation. Sometimes, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.[354] But often, the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

> "The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present."[355]

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

> "The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 [...]
>
> Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq.* of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under

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[354] This is true of France's reservation to the European Agreement supplementing the Convention on Road Signs and Signals: "With regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic" (*Multilateral Treaties* ..., vol. I, p. 907 (chap. XI-B.24)).

[355] *Ibid.*, p. 181 (chap. IV.4). See also the Gambia's reservation (*ibid.*, p. 188).

those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith."[356]

(8) In the light of the obvious advantages of giving reasons for reservations and the role this practice plays in the reservations dialogue, the Commission chose not to stipulate in guideline 2.1.9 that reasons should accompany the reservation and be an integral part thereof - as is generally the case for reasons for objections[357] - but this is no doubt desirable, even though there is nothing to prevent a State or international organization from stating the reasons for its reservation *ex post facto*.

(9) Furthermore, although it seems wise to encourage the giving of reasons, this practice must not, in the Commission's view, become a convenient smokescreen used to justify the formulation of general or vague reservations. According to guideline 3.1.7 (Vague, general reservations), "[a] reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty". Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its validity. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its validity; the reasons can only facilitate this assessment.[358]

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[356] *Ibid.*, pp. 181-182 (chap. IV.4).

[357] See guideline 2.6.10 and the commentary thereto below. It is in any case extremely difficult to distinguish the reservation from the reasons for its formulation if they both appear in the same instrument.

[358] Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a "dubious" reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation:

> "Article 8 of the Convention requires the parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.
>
> The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.
>
> Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows."

(10) Likewise, the fact that reasons may be given for a reservation at any time cannot be used by authors to modify or widen the scope of a reservation made previously. This is stipulated in guidelines 2.3.4 (Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations) and 2.3.5 (Widening of the scope of a reservation).

2.6 Formulation of objections

2.6.5 Author

An objection to a reservation may be made by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

Commentary

(1) Guideline 2.6.1 on the definition of objections to reservations does not resolve the question of which States or international organizations have the freedom to make or formulate objections to a reservation made by another State or another international organization. That is the purpose of guideline 2.6.5.

(2) The Vienna Conventions provide some guidance on the question of the possible authors of an objection. Article 20, paragraph 4 (b), of the 1986 Convention refers to "an objection by a contracting State or by a contracting organization to a reservation ...". It is clear from this that contracting States and contracting international organizations within the meaning of article 2, paragraph 1 (f), of the 1986 Vienna Convention are without any doubt possible authors of an objection to a reservation. This hypothesis is covered by subparagraph (i) of guideline 2.6.5.

(3) The Commission has been divided, however, over the question of whether States or international organizations that are entitled to become parties to a treaty may also formulate objections. According to one viewpoint, these States and international organizations do not have

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(*Multilateral Treaties ...*, vol. I, p. 477 (chap. VI.19)).

Without such an explanation, Belize's reservation might have been considered "vague or general" and might thus have fallen within the scope of guideline 3.1.7. Accompanied by this explanation, it appears much more defensible.

the same rights as contracting States and international organizations and therefore cannot formulate objections as such. It was argued that the fact that the Vienna Convention makes no reference to the subject should not be interpreted as granting this category of States and international organizations the right to formulate objections, and that it would follow from article 20, paragraph 5, of the Vienna Conventions that only contracting parties may formulate objections. It was further argued that, as a consequence, declarations formulated by States and international organizations, which are so far merely entitled to become a party to the treaty,[359] should not be qualified as objections. According to this same opinion, allowing for such a possibility might create a practical problem since, in the case of an open treaty, the parties to such a treaty might not have been made aware of certain objections.

(4) Nevertheless, according to the majority view, the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions, make no exclusion of any kind; on the contrary, they allow States and international organizations that are entitled to become parties to the treaty to formulate objections within the definition contained in guideline 2.6.1. Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations in no way means that such other States or organizations may not formulate objections.[360] The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the Vienna Conventions might seem to imply is not found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Moreover, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States and contracting international organizations but also to "other States and international organizations entitled to become parties to the treaty".[361] Such a notification has meaning only if these other

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[359] This position seems to be defended by Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", AJIL., vol. 85 (1991), No. 2, p. 297.

[360] In this regard, see Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), p. 150.

[361] See also article 77, paragraphs 1 (e) and (f), of the Vienna Conventions, regarding the function of the depositary with regard to "States and international organizations entitled to become parties ...".

States and international organizations can in fact react to the reservation by way of an express acceptance or an objection. Lastly, and most importantly, this position appeared to the Commission to be the only one that was compatible with the letter and spirit of guideline 2.6.1, which defines objections to reservations not in terms of the effects they produce but in terms of those that objecting States or international organizations *intend for them to produce*.[362]

(5) This point of view is confirmed by the advisory opinion of the International Court of Justice on *Reservations to the 1951 Convention on the Prevention and Punishment of the Crime of Genocide*. In the operative part of its opinion, the Court clearly established that States that are entitled to become parties to the Convention can formulate objections:

> "THE COURT IS OF OPINION, ...
>
> (*a*) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;
>
> (*b*) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."[363]

(6) In State practice, non-contracting States often formulate objections to reservations. For instance, Haiti objected to the reservations formulated by Bahrain to the Vienna Convention on Diplomatic Relations at a time when it had not even signed the Convention.[364] Similarly, the United States of America formulated two objections to the reservations made by the Syrian Arab Republic and Tunisia to the 1969 Vienna Convention on the Law of Treaties even

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[362] The definition of the term "reservation", as set out in article 2, paragraph 1 (d), of the Vienna Conventions, and reproduced in guideline 1.1, is formulated in the same manner: it concerns declarations that are *intended* to produce certain effects (but that do not necessarily do so).

[363] *I.C.J. Reports 1951*, p. 30, para. III (despite the wording of subparagraph (b), some members of the Commission are of the view that the Court was referring here only to signatory States). The same position was also taken by H. Waldock in his first report on the law of treaties. Draft article 19, which is devoted entirely to objections and their effects, provided that "any State which is *or is entitled to become a party* to a treaty shall have the right to object ..." (*Yearbook ... 1962*, vol. II, p. 70 (italics added)). However, it is noted that this language was left out of the Vienna Convention on the Law of Treaties in relation to objections.

[364] *Multilateral Treaties* ..., vol. I, p. 96 (chap. III.3) - date of objection: 9 May 1972, date of accession: 2 February 1978.

though it was not - and is not - a contracting State to this Convention.[365] Likewise, in the following examples, the objecting States were, at the time they formulated their objections, mere signatories to the treaty (which they later ratified):

- Objection of Luxembourg to the reservations made by the Soviet Union, the Byelorussian SSR and the Ukrainian SSR to the Vienna Convention on Diplomatic Relations;[366] and

- Objections of the United Kingdom of Great Britain and Northern Ireland to reservations made by Bulgaria, the Byelorussian SSR, Czechoslovakia, the Ukrainian SSR, Romania, the USSR, Iran and Tunisia to the Convention on the Territorial Sea and the Contiguous Zone[367] and to those made by Bulgaria, Hungary, Poland, the Byelorussian SSR, the Ukrainian SSR, Romania, Czechoslovakia, the USSR and Iran to the Convention on the High Seas.[368]

(7) In the practice of the Secretary-General as depositary, such objections formulated by States or international organizations that are entitled to become parties to the treaty are conveyed by means of "communications"[369] and not "depositary notifications"; however, what is "communicated" are unquestionably objections in the sense of guideline 2.6.1.

(8) According to the majority position, then, it seems entirely possible that States and international organizations that are entitled to become parties to the treaty may formulate objections in the sense of the definition contained in guideline 2.6.1 even though they have not expressed their consent to be bound by the treaty. This possibility is established in subparagraph (ii) of guideline 2.6.5.

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[365] *Ibid.*, vol. II, p. 417 (chap. XXIII.1).

[366] *Ibid.*, vol. I, p. 96 (chap. III.3) - date of signature: 2 February 1962; date of objection: 18 January 1965; date of ratification: 17 August 1966.

[367] *Ibid.*, vol. II, p. 317 (chap. XXI.1) - date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

[368] *Ibid.*, vol. II, p. 323 (chap. XXI.2) - date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

[369] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8, New York, 1997), para. 214.

(9) In reality, it would seem not only possible but also wise for States or international organizations that intend to become parties but have not yet expressed their definitive consent to be bound to express their opposition to a reservation and to make their views known on the reservation in question. As the Court noted in its advisory opinion of 1951, such an objection "merely serves as a notice to the other State of the eventual attitude of the signatory State".[370] Such notification may also prove useful both for the reserving State or organization and, in certain circumstances, for the treaty monitoring bodies.

(10) In any event, there is no doubt that an objection formulated by a State or organization that has not yet expressed its consent to be bound by the treaty does not immediately produce the legal effects intended by its author. This is evidenced also by the operative part of the advisory opinion of 1951, which states that such an objection "can have the legal effect indicated in the reply to Question I only upon ratification" by the State or the organization that formulated it.[371] The potential legal effect of an objection formulated by a State or an international organization prior to becoming a party to the treaty is realized only upon ratification, accession or approval of the treaty (if it is a treaty in solemn form) or signature (in the case of an executive agreement). This does not preclude qualifying such statements as objections; however, they are "conditional" or "conditioned" in the sense that their legal effects are subordinate to a specific act: the expression of definitive consent to be bound.

2.6.6 Joint formulation

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

Commentary

(1) Even though, according to the definition contained in guideline 2.6.1, an objection is a unilateral statement,[372] it is perfectly possible for a number of States and/or a number of international organizations to formulate an objection collectively and jointly. Practice in this area is not highly developed; it is not, however, non-existent.

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[370] *I.C.J. Reports 1951*, p. 30, para. III of the operative part.

[371] *Ibid.*

[372] See also the commentary to guideline 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 189, para. (6) of the commentary.

(2) In the context of regional organizations, and in particular the Council of Europe, member States strive, to the extent possible, to coordinate and harmonize their reactions and objections to reservations. Even though these States continue to formulate objections individually, they coordinate not only on the appropriateness but also on the wording of objections.[373] Technically, however, these objections remain unilateral declarations on the part of each author State.

(3) Yet it is also possible to cite cases in which States and international organizations have formulated objections in a truly joint fashion. For example, the European Community and its (at that time) nine member States objected, via a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic regarding article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 4 November 1975, which offers customs unions and economic unions the possibility of becoming contracting parties.[374] The European Community has also formulated a number of objections "on behalf of the European Economic Community and of its member States".[375]

(4) It seemed to the Commission that there was no fault to be found with the joint formulation of an objection by several States or international organizations: it is difficult to imagine what might prevent them from doing jointly what they can doubtless do individually and under the same terms. Such flexibility is all the more desirable in that, given the growing number of common markets and customs and economic unions, precedents consisting of the objections or joint interpretative declarations cited above are likely to increase, as these institutions often exercise shared competence with their member States. Consequently, it would be quite unnatural to require that the latter should act separately from the institutions to which they belong. Thus, from a technical standpoint there is nothing to prevent the joint formulation of an objection. However, this in no way affects the unilateral nature of the objection.

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[373] See, for example, the objections of certain States members of the Council of Europe to the International Convention for the Suppression of Terrorist Bombings of 1997 (*Multilateral Treaties* ..., vol. II, pp. 138-146 (chap. XVIII.9)) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*, pp. 175-192, chap. XVIII.11).

[374] *Ibid.*, vol. I, p. 639 (chap. XI-A.16).

[375] See, for example, the objection to the declaration made by the Soviet Union in respect of the Wheat Trade Convention of 1986 (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987* (ST/LEG/SER.E/6), chap. XIX.26) and the identical objection to the declaration made by the Soviet Union in respect of the Tropical Timber Agreement of 1983 (*ibid.*, chap. XIX.28). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to counter-terrorism conventions (para. (2) above).

(5) The wording of guideline 2.6.6 is modelled on that of guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly). Nevertheless, in the English text, after the adjective "unilateral", the word "character" was preferred over the word "nature". This change offers the advantage of aligning the English text with the French version but will make it necessary to harmonize the three draft guidelines during the second reading.

2.6.7 Written form

An objection must be formulated in writing.

Commentary

(1) Pursuant to article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, an objection to a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

(2) As is the case for reservations,[376] the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the Vienna Conferences. In his first report, H. Waldock, the first special rapporteur to draft provisions on objections already provided in paragraph 2 (a) of draft article 19 that "an objection to a reservation shall be formulated in writing ...",[377] without making this formal requirement the subject of commentary.[378] While the procedural guidelines were comprehensively revised by the Special Rapporteur in light of the comments of two Governments suggesting that "some simplification of the procedural provisions"[379] was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

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[376] See guideline 2.1.1 (Written form) and commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103.

[377] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62.

[378] *Ibid*., p. 78, para. (22) of the commentary on draft article 19, which refers the reader to the commentary to draft article 17 (*ibid*., p. 75, para. (11)).

[379] These were the Governments of Sweden and Denmark. See H. Waldock, fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 48-49 and 56, para. 13.

- In article 19, paragraph 5, adopted on first reading (1962): "An objection to a reservation shall be formulated in writing ..." and "shall be communicated";[380]

- In article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): "An objection to a reservation must be in writing";[381]

- In article 20, paragraph 1, adopted on second reading (1965): "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty".[382]

The written form was not called into question at the Vienna Conference in 1968 and 1969 either. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.[383]

(3) That objections must be in written form is well established. Notification, another procedural requirement applicable to objections (by virtue of article 23, paragraph 1, of the Vienna Conventions), requires a written document; oral communication alone cannot be filed or registered with the depositary of the treaty or communicated to other interested States. Furthermore, considerations of legal security justify and call for the written form. One must not forget that an objection has significant legal effects on the opposability of a reservation, the applicability of the provisions of a treaty as between the reserving State and the objecting State (article 21, paragraph 3, of the Vienna Conventions) and the entry into force of the treaty (art. 20, para. 4). In addition, an objection reverses the presumption of acceptance arising from article 20, paragraph 5, of the Vienna Conventions, and written form is an important means of proving

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[380] *Yearbook ... 1962*, vol. II, p. 194.

[381] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 56.

[382] *Yearbook ... 1965*, vol. II, p. 175. Draft article 20 of 1965 became draft article 18, without modification, in the text adopted by the International Law Commission in 1966 (*Yearbook ... 1966*, vol. II, p. 226).

[383] See the Spanish amendment: "A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty." (A/CONF.39/C.1/L.149, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 150).

whether a State did indeed express an objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

(4) Guideline 2.6.7 therefore confines itself to reproducing the requirement of written form for the objections referred to in the first part of article 23, paragraph 1, of the Vienna Convention, and parallels guideline 2.1.1 relating to the written form of reservations.

2.6.8 Expression of intention to preclude the entry into force of the treaty

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

Commentary

(1) As article 20, paragraph 4 (b), of the Vienna Conventions shows, a State or an international organization objecting to a reservation may oppose the entry into force of a treaty as between itself and the author of the reservation. In order for this to be so, according to the same provision, that intent must still be "definitely expressed by the objecting State or organization". Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between the reserving State and the objecting State decided at the 1969 Vienna Conference,[384] a clear and unequivocal statement is necessary in order to preclude the entry into force of the treaty in relations between the two States.[385] This is how article 20, paragraph 4 (b), of the Vienna Conventions, on which the text of guideline 2.6.8 is largely based, should be understood.

(2) The objection of the Netherlands to the reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide certainly meets the requirement of definite expression; it states that "the Government of the Kingdom of the Netherlands ... does not deem

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[384] See, in particular, the amendment tabled by the Union of Soviet Socialist Republics (A/CONF.39/L.3, *ibid.*, pp. 285-286) finally adopted by the Conference (*United Nations Conference on the Law of Treaties, Official records, Second Session, Vienna, 9 April-22 May 1969, Summary records* (A/CONF.39/11/Add.1), tenth plenary meeting, 29 April 1969, p. 35, para. 79).

[385] See R. Baratta, *Gli effetti delle riserve ai trattati* (Milan: A. Giuffrè, 1999), p. 352. The author states: "There is no doubt that in order for the expected consequence of the rule regarding a qualified objection to be produced, the author must state its intention to that effect." See, however, paragraph 6 below.

any State which has made or will make such reservation a party to the Convention".[386] France also very clearly expressed such an intention regarding the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), by declaring that it would not "be bound by the ATP Agreement in its relations with the United States of America".[387] Similarly, the United Kingdom stated in its objection to the reservation of the Syrian Arab Republic to the Vienna Convention on the Law of Treaties that it did "not accept the entry into force of the Convention as between the United Kingdom and Syria".[388]

(3) On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the author of the objection and the author of the reservation. Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author of the reservation.[389]

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[386] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, pp. 132-133 (chap. IV.1). See also the objection of China (*ibid.*, p. 131).

[387] *Ibid.*, vol. I, p. 899 (chap. XI.B.22). See also the objection of Italy (*ibid.*).

[388] *Ibid.*, vol. II, p. 416 (chap. XXIII.1). See also the objection of the United Kingdom to the reservation of Viet Nam (*ibid.*, p. 417).

[389] Among many examples, see the objections of several States members of the Council of Europe to the reservation of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism on the basis of the incompatibility of the reservation with the object and purpose of the Convention (Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Latvia, Netherlands, Norway, Portugal, Sweden); *Multilateral Treaties ...*, vol. II, pp. 175-192 (chap. XVIII.11)). In every case it is stated that the objection does not preclude the entry into force of the Convention between the objecting State and the Syrian Arab Republic. See also Belgium's objections to the Egyptian, Cambodian and Moroccan reservations to the Vienna Convention on Diplomatic Relations (*ibid.*, vol. I, p. 94 (chap. III.3)) or the objections of Germany to several reservations concerning the same Convention (*ibid.*, pp. 95-96). It is, however, interesting to note that even though Germany considers all the reservations in question to be "incompatible with the letter and spirit of the Convention", the German Government stated for only some objections that they did not preclude the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were raised to the United States reservation to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, pp. 191-200 (chap. IV.4)). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid.*). The phenomenon is not, however, limited to human rights treaties. See, for example, the objections made by Austria, France, Germany and Italy to Viet Nam's reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, pp. 482-483 (chap. V.19)) or the objections made by the States members of the Council of Europe to the reservations to the International Convention for the

(4) Neither the Vienna Conventions nor the *travaux préparatoires* thereto gives any useful indication regarding the time at which the objecting State or international organization must clearly express its intention to oppose the entry into force of the treaty as between itself and the reserving State. It is nevertheless possible to proceed by deduction. According to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, whereby an objection does not preclude the entry into force of a treaty in treaty relations between an objecting State or international organization and the reserving State or international organization unless the contrary is expressly stated, an objection that is not accompanied by such a declaration results in the treaty entering into force, subject to article 21, paragraph 3, of the Vienna Conventions concerning the effect of a reservation on relations between the two parties. If the objecting State or international organization expressed a different intention in a subsequent declaration, it would undermine its legal security.

(5) However, this is the case only if the treaty actually enters into force in relations between the two States or international organizations concerned. It may also happen that although the author of the objection has not ruled out this possibility at the time of formulating the objection, the treaty does not enter into force immediately, for other reasons.[390] In such a case the Commission considered that there was no reason to prohibit the author of the objection from expressing the intention to preclude the entry into force of the treaty at a later date; such a solution is particularly necessary in situations where a long period of time may elapse between the formulation of the initial objection and the expression of consent to be bound by the treaty by the reserving State or international organization or by the author of the objection. Accordingly, while excluding the possibility that a declaration "maximizing" the scope of the objection can be made after the entry into force of the treaty between the author of the reservation and the author of the objection, the Commission made it clear that the intention to preclude the entry into force of the treaty must be expressed "before the treaty would otherwise enter into force" between them, without making expression of the will to oppose the entry into force of the treaty in all cases at the time the objection is formulated a prerequisite.

Suppression of Terrorist Bombings of 1997 (*ibid.*, vol. II, pp. 138-146 (chap. XVIII.9)) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*, p. 124 (chap. XVIII.7)).

[390] Insufficient number of ratifications or accessions, additional time provided under the provisions of the treaty itself.

(6) Nevertheless, expression of the intention to preclude the entry into force of a treaty by the author of the objection or the absence thereof does not in any way prejudge the question of whether the treaty actually enters into force between the reserving State or international organization and the State or international organization that made an objection. This question concerns the combined legal effects of a reservation and the reactions it has prompted, and is to some extent separate from that of the intention of the States or international organizations concerned.

2.6.9 Procedure for the formulation of objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

Commentary

(1) The procedural rules concerning the formulation of objections are not notably different from those that apply to the formulation of reservations. This is, perhaps, the reason why the International Law Commission apparently did not pay very much attention to these issues during the *travaux préparatoires* for the 1969 Vienna Convention.

(2) This lack of interest can easily be explained in the case of the special rapporteurs who advocated the traditional system of unanimity, namely Brierly, Lauterpacht and Fitzmaurice.[391] While it was only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and, consequently, the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

(3) H. Waldock's first report, which introduced the "flexible" system in which objections play a role that is, if not more important, then at least more ambiguous, contained an entire draft article on procedural issues relating to the formulation of objections.[392] Despite the very detailed

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[391] Even though Lauterpacht's proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating them. See the alternative drafts of article 9, H. Lauterpacht, [First] Report on the law of treaties, (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91-92.

[392] This draft article 19 contained the following provision:

> "2. (*a*) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

nature of this provision, the report limits itself to a very brief commentary, indicating that "the provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (art. 17) and on consent to reservations and its effects (art. 18)] and do not therefore need further explanation".[393]

(4) After major reworking of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,[394] only draft article 18, paragraph 5, presented by the Drafting Committee in 1962 deals with the formulation and the notification of an objection,[395] a provision

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(*b*) The objection shall be communicated to the reserving State and to all other States which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

(*c*) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

(i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and

(ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

3. (*a*) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

(*b*) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

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(First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62).

[393] *Ibid.*, p. 68, para. (22) of the commentary.

[394] The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by H. Waldock is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission. On that occasion, the Special Rapporteur stated that "the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance" (*Yearbook ... 1962*, vol. I, 663rd meeting, para. 36).

[395] *Yearbook ... 1962*, vol. I, 668th meeting, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *Yearbook ... 1962*, vol. II, p. 176.

which, in the view of the Commission, "do[es] not appear to require comment".[396] That lack of interest continued into 1965, when the draft received its second reading. And even though objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.[397]

(5) The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, which sets forth the procedure for formulating an express acceptance of or an objection to a reservation. In 1965, Mr. Castrén rightly observed:

> "Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation."[398]

(6) Therefore, it may be wise simply to take note, within the framework of the Guide to Practice, of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.[399]

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[396] *Yearbook ... 1962*, vol. II, p. 180, para. (18) of the commentary.

[397] Fourth report on the law of treaties (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 53-54, para. 19.

[398] *Yearbook ... 1965*, vol. I, 799th meeting, para. 53.

[399] See article 20, paragraph 4 (b), and article 23, paragraph 3, of the Vienna Conventions.

(7) This is particularly true of the rules regarding the authorities competent to formulate reservations at the international level and the consequences (or the absence of consequences) of the violation of internal rules regarding the formulation of reservations, the rules regarding the notification and communication of reservations and the rules regarding the functions of the depositary in this area. These rules would seem to be transposable *mutatis mutandis* to the formulation of objections. Rather than reproducing guidelines 2.1.3 (Formulation of a reservation at the international level),[400] 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[401] 2.1.5 (Communication of reservations),[402] 2.1.6 (Procedure for communication of reservations)[403] and 2.1.7 (Functions of depositaries)[404] by simply replacing "reservation" with "objection" in the text of the guidelines, the Commission considered it prudent to make a general reference in the texts of these guidelines[405] which apply *mutatis mutandis* to objections.

2.6.10 Statement of reasons

An objection should to the extent possible indicate the reasons why it is being made.

Commentary

(1) Neither of the Vienna Conventions contains a provision requiring States to give the reasons for their objection to a reservation. Furthermore, notwithstanding the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand, H. Waldock never at any point envisaged requiring a statement of the reasons for an objection. This is regrettable.

(2) Under the Vienna Convention regime, the freedom to object to a reservation is very broad, and a State or international organization may object to a reservation for any reason whatsoever, irrespective of the validity of the reservation: "No State can be bound by contractual obligations

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[400] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 68-75.

[401] *Ibid.*, pp. 75-79.

[402] *Ibid.*, pp. 79-83.

[403] For text and commentary of guideline 2.1.6, see above present report.

[404] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112.

[405] The Commission proceeded in the same manner in guidelines 1.5.2 (referred to guidelines 1.2 and 1.2.1), 2.4.3 (referred to guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, in 2.5.6 (referred to guidelines 2.1.5, 2.1.6 and 2.1.7).

it does not consider suitable."[406] Furthermore, during discussions in the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely political.[407] Since this is the case, stating reasons risks uselessly embarrassing an objecting State or international organization, without any gain to the objecting State or international organization or to the other States or international organizations concerned.

(3) Yet the issue is different where a State or international organization objects to a reservation because it considers it invalid (whatever the reason for this position). Leaving aside the question as to whether there may be a legal obligation for States[408] to object to reservations that are incompatible with the object and purpose of a treaty nevertheless, in a "flexible" treaty regime the objection clearly plays a vital role in the determination of the validity of a reservation. In the absence of a mechanism for reservation control, the onus is on States and international organizations to express, through objections, their view, necessarily subjective, on the validity of a given reservation.[409] Such a function can only be fulfilled, however, by objections motivated by considerations regarding the non-validity of the reservation in question. Even if only for this

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[406] Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466.

[407] See, for example, the statement of the United States representative in the Sixth Committee during the fifty-eighth session of the General Assembly: "Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions" (A/C.6/58/SR.20, para. 9). During the sixtieth session, the representative of the Netherlands stated that "in the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral" (A/C.6/60/SR.14, para. 31); on the political aspect of an objection, see Portugal (A/C.6/60/SR.16, para. 44). See also the Inter-American Court of Human Rights, Separate Opinion of Judge A.A. Cançado Trinidade in the case of *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Series C, No. 123, para. 24.

[408] The Netherlands observed that "States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty" (A/C.6/60/SR.16, para. 29). According to this line of reasoning, "a party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the object and purpose of the treaty" (Françoise Hampson, Final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 24); Ms. Hampson observed, however, that there did not seem to be a general obligation to formulate an objection to reservations incompatible with the object and purpose of the treaty (*ibid.*, para. 30).

[409] Some treaty regimes go so far as to rely on the number of objections in order to determine the admissibility of a reservation. See for example article 20, paragraph 2, of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which states: "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it*" (emphasis added).

reason, it would seem reasonable to indicate to the extent possible the reasons for an objection. It is difficult to see why an objection formulated for purely political reasons should be taken into account in evaluating the conformity of a reservation with the requirements of article 19 of the Vienna Conventions.

(4) In addition, indicating the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the validity of the reservation but, like the statement of reasons for the reservation itself,[410] also provides important evidence to the monitoring bodies called on to decide on the conformity of a reservation with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found confirmation of its conclusions regarding the reservation of Turkey to its declaration of acceptance to the Court's jurisdiction in the declarations and objections made by other States parties to the European Convention on Human Rights.[411] Similarly, in the working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Ms. Hampson stated that "in order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections".[412] The Human Rights Committee itself, in its general comment No. 24, which, while demonstrating deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the validity of a reservation, nevertheless states that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".[413]

(5) State practice shows that States often indicate in their objections not only that they consider the reservation in question contrary to the object and purpose of the treaty but also, in more or less detail, how and why they reached that conclusion. At the sixtieth session of the

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[410] See guideline 2.1.9 and paragraphs (4) to (6) of the commentary above.

[411] *Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, Report of Judgments and Decisions of the European Court of Human Rights*, Series A, vol. 310, pp. 28-29, para. 81. See also the statement of the representative of Sweden on behalf of the Nordic countries in the Sixth Committee (A/C.6/60/SR.14, para. 22).

[412] Final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42, para. 28); see, more generally, paragraphs 21-35 of this study.

[413] CCPR/C/21/Rev.1/Add.6, para. 17.

General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections.[414]

(6) In the light of these considerations and notwithstanding the absence of an obligation in the Vienna regime to give the reasons for objections, the Commission considered it useful to include in the Guide to Practice guideline 2.6.10, which encourages States and international organizations to expand and develop the practice of stating reasons. However, it must be clearly understood that such a provision is only a recommendation, a guideline for State practice, and that it does not codify an established rule of international law.

(7) Guideline 2.6.10 is worded along the lines of guideline 2.1.9 concerning the statement of reasons for reservations, and goes no further than this; it does not specify the point at which the reasons for an objection must be given. Since the same causes produce the same effects,[415] it would nonetheless seem desirable that, to the extent possible, the objecting State or international organization should indicate the reasons for its opposition to the reservation in the instrument giving notification of the objection.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

An objection to a reservation made by a State or an international organization before a reservation has been confirmed in accordance with guideline 2.2.1 does not itself require confirmation.

Commentary

(1) While article 23, paragraph 2, of the Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty[416] objections do not need confirmation. Article 23, paragraph 3, of the Vienna Conventions provides:

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[414] A/C.6/60/SR.16, para. 20.

[415] See paragraph (8) of the commentary to guideline 2.1.9 above.

[416] See also guideline 2.2.1 (Reservations formulated when signing and formal confirmation) and, for the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157.

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

Guideline 2.6.11 simply reproduces some of the terms of this provision with the necessary editorial amendments to limit its scope to objections only.

(2) The provision contained in article 23, paragraph 3, of the 1969 Vienna Convention was included only at a very late stage of the *travaux préparatoires* for the Convention. The early draft articles relating to the procedure applicable to the formulation of objections did not refer to cases where an objection might be made to a reservation that had yet to be formally confirmed. It was only in 1966 that the non-requirement of confirmation of an objection was expressed in draft article 18, paragraph 3, adopted on second reading in 1966,[417] without explanation or illustration; however, it was presented at that time as *lex ferenda*.[418]

(3) This is a common sense rule: the formulation of the reservation concerns all States and international organizations that are contracting parties or entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of the reservation and each of the accepting or objecting States or organizations. The reservation is an "offer" addressed to all contracting parties, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the treaty and risks reducing it to a series of bilateral relations. On the other hand, it is not important whether the acceptance or objection is made before or after the confirmation of the reservation: what is important is that the reserving State or organization is aware of its partners' intentions;[419] which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

(4) State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed

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[417] *Yearbook ... 1966*, vol. II, p. 208.

[418] "The Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event" (*ibid.*, para. (5) of the commentary).

[419] In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice described the objection made by a signatory as a "warning" addressed to the author of the reservation (*I.C.J. Reports 1951*, p. 29).

its reservation, but at other times they refrain from doing so.[420] Although the latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive quality of the rule laid down in article 23, paragraph 3: these are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*). However, some members of the Commission consider that such confirmation is required when a long period of time has elapsed between the formulation of the reservation and the formal confirmation of the reservation.

(5) In the opinion of a minority of members who refuse to view declarations made by States or international organizations that are not contracting parties as real objections,[421] such declarations should in all cases be confirmed. This position was not accepted by the Commission, which considers that it is not necessary to make such a distinction.[422]

2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

Commentary

(1) Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question of whether an objection by a State or an international organization that, when formulating it, has yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although H. Waldock did not overlook the possibility that an

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[420] For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the Byelorussian SSR, Czechoslovakia, Ukraine and the Soviet Union when those States ratified that Convention while confirming their reservations (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, pp. 131-132 (chap. IV.1)). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the Rights of the Child when Turkey confirmed its reservation in its instrument of ratification (*ibid.*, pp. 341-342 (chap. IV.11)).

[421] See paragraph (3) of the commentary to guideline 2.6.5 above.

[422] See paragraphs (4) and (5) of the commentary to guideline 2.6.5 above.

objection might be formulated by signatory States or by States only entitled to become parties to the treaty,[423] the question of the subsequent confirmation of such a reservation was never raised.[424] A proposal in that regard made by Poland at the Vienna Conference[425] was not considered. Accordingly the Convention has a gap that the Commission should endeavour to fill.

(2) State practice in this regard is all but non-existent. One of the rare examples is provided by the objections formulated by the United States of America to a number of reservations to the 1969 Vienna Convention itself.[426] In its objection to the Syrian reservation, the United States - which has yet to express its consent to be bound by the Convention - specified that it:

> "intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, *to reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention".[427]

Curiously, the second United States objection, formulated against the Tunisian reservation, does not contain the same statement.

(3) In its 1951 advisory opinion, the International Court of Justice also seemed to take the view that objections made by non-States parties do not require confirmation. It considered that:

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[423] See in particular paragraph 3 (b) of the draft article 19 proposed by H. Waldock in his first report on the law of treaties (*Yearbook ... 1962*, vol. II, p. 62) or paragraph 6 of the draft article 20 proposed in his fourth report (*Yearbook ... 1965*, vol. II, p. 55).

[424] Except, perhaps, in a comment made incidentally by Mr. Tunkin, *Yearbook ... 1965*, vol. I, 799th meeting, para. 38: "It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20."

[425] Mimeograph A/CONF.39/6/Add.1, p. 18. The Polish Government proposed that paragraph 2 of article 18 (which became article 23), should be worded as follows: "If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation as well as an eventual objection to it must be formally confirmed by the reserving and objecting States when expressing their consent to be bound by the treaty. In such a case the reservation and the objection shall be considered as having been made on the date of their confirmation."

[426] The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties ...*, vol. II, p. 411 (chap. XXIII.1).

[427] *Ibid.*, p. 417 (italics added).

> "Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, *or they would become effective on ratification.*
>
> [...] The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect."[428]

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.[429] Nonetheless, it has yet to take a formal stand on this question and the debate has been left open.

(4) It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an international organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference[430] considered that such a confirmation was necessary. The fact that the Polish amendment,[431] which aimed to bring objections in line with reservations in that respect, was not adopted further confirms this argument. These considerations are further strengthened if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly enshrined in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the nature of progressive development than codification *stricto sensu*.[432] Therefore, the disparity on this score between the procedural rules laid down for

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[428] *I.C.J. Reports 1959*, pp. 28-29 (italics added).

[429] See in this sense F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institut, 1988), p. 137.

[430] *Ibid.*

[431] See footnote 425 above.

[432] See H. Waldock's first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 66, paragraph (11) of the commentary to draft article 17; D.W. Greig, "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 28; F. Horn, (footnote 429 above), p. 41. See also the commentary to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 467-468, para. (8) of the commentary.

the formulation of reservations, on the one hand, and the formulation of objections, on the other, could not have been due to a simple oversight but could reasonably be considered deliberate.

(5) There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. A reservation formulated before the reserving State or international organization becomes a contracting party to the treaty should produce no legal effect and will remain a "dead letter" until such a time as the State's consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections, too, produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions only when the objecting State or international organization has become a contracting party, they are not without significance even before then. They express their author's opinion of a reservation's validity or admissibility and, as such, may be taken into consideration by the bodies having competence to assess the validity of reservations.[433] Moreover, and on this point the 1951 advisory opinion of the International Court of Justice remains valid, objections give notice to reserving States with regard to the attitude of the objecting State *vis-à-vis* their reservation. As the Court observed:

> "The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation."[434]

Such an objection, formulated prior to the expression of consent to be bound by the treaty, therefore encourages the reserving State to reconsider, modify or withdraw its reservation in the same way as an objection raised by a contracting State. This notification would, however, become a mere possibility if the objecting State were required to confirm its objection at the time it expressed its consent to be bound by the treaty. The requirement for an additional formal confirmation would thus, in the view of the Commission, largely undermine the significance attaching to the freedom of States and international organizations that are not yet contracting parties to the treaty to raise objections.

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[433] See paragraph (4) of the commentary to guideline 2.6.10 above.

[434] *I.C.J. Reports 1951*, p. 29.

(6) Moreover, non-confirmation of the objection in such a situation poses no problem of legal security. The objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification or communication relating to the treaty,[435] be made in writing and communicated and notified, in the same way as an objection emanating from a party. Furthermore, unlike a reservation, an objection modifies treaty relations only with respect to the bilateral relations between the reserving State - which has been duly notified - and the objecting State. The rights and obligations assumed by the objecting State *vis-à-vis* other States parties to the treaty are not affected in any way.

(7) As convincing as these considerations might seem, the Commission nevertheless felt it necessary to draw a distinction between two different cases: objections formulated by signatory States or international organizations and objections formulated by States or international organizations that had not yet signed the treaty at the time the objection was formulated. It seems that by signing the treaty the first category of States and international organizations enjoys legal status *vis-à-vis* the instrument in question,[436] while the others have the status of third parties. Even though such third parties can formulate an objection to a reservation,[437] the Commission is of the view that formal confirmation of such objections would be appropriate at the time the author State or international organization signs the treaty or expresses its consent to be bound by it. This would seem all the more necessary in that a significant amount of time can elapse between the time an objection is formulated by a State or international organization that had not signed the treaty when it made the objection and the time at which the objection produces its effects.

(8) The Vienna Conventions do not define the notion of a "State [that] has signed the treaty", which the Commission has used in guideline 2.6.12. It nevertheless follows from article 18, subparagraph (a), of the Vienna Conventions that it is States or international organizations that

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[435] See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

[436] See in particular article 18, subparagraph (a), of the Vienna Conventions.

[437] See guideline 2.6.5 above.

have "signed the treaty or [have] exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until [they] shall have made [their] intention clear not to become a party to the treaty".

2.6.13 Time period for formulating an objection

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

Commentary

(1) The question of the time at which, or until which, a State or an international organization may raise an objection is partially and indirectly addressed by article 20, paragraph 5, of the Vienna Conventions. In its 1986 form, this provision states:

> "For the purposes of paragraphs 2 and 4,[438] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

(2) Guideline 2.6.13 isolates those elements of the provision having to do specifically with the time period within which an objection can be formulated.[439] Once again, a distinction is drawn between two possible situations.

(3) The first situation involves States and international organizations that are contracting States or international organizations at the time the reservation is notified. They have a period of 12 months within which to make an objection to a reservation, a period that runs from the time of receipt of the notification of the reservation by the States and international organizations for which it is intended, in accordance with guideline 2.1.6.

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[438] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, with reference to treaties with limited participation and the constituent acts of international organizations.

[439] The Commission notes that from a strictly logical standpoint it would have been more appropriate to speak of the time period during which an objection can be "made". It nevertheless chose to remain faithful to the letter of article 20, paragraph 5, of the Vienna Conventions.

(4) The 12-month period established in article 20, paragraph 5, was the result of an initiative by H. Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from - the fairly diverse - State practice at that time. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,[440] but preferred to follow the proposal of the Inter-American Council of Jurists.[441] In that regard, he noted the following:

> "But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed."[442]

(5) The 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance, provided for in article 20, paragraph 5, of the Vienna Conventions, did not, however, seem to be a well-established customary rule at the time of the Vienna Conference; nevertheless, it is still "the most acceptable" period.[443] F. Horn noted the following in this regard:

> "A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving State and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted States to undertake the necessary analysis of the possible effects a reservation may have for them."[444]

(6) In fact, this time period - which clearly emerged from the progressive development of international law when the Vienna Convention was adopted - has never fully taken hold as a

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[440] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. 14.

[441] *Ibid.*, p. 67, para. 16.

[442] *Ibid.*

[443] P.-H. Imbert, *Les réserves aux traités multilatéreaux* (Paris: Pedone, 1979), p. 107. D.W. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least "a guide to what is reasonable" (footnote 432 above) p.128.

[444] F. Horn, (footnote 429 above) p.126.

customary rule that is applicable in the absence of text.[445] For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.[446] This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.[447] However, having decided that this practice delayed the entry into force of treaties and their registration,[448] the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.[449] In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), could ever be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting Parties would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. In 2000, the Legal Counsel of the United Nations also stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the - necessarily unanimous - acceptance of late reservations.[450] Moreover, State practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has elapsed. Whatever uncertainties there may be regarding the "positive quality" of the rule with regard to general international law, the rule is retained by the Vienna Conventions, and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages: according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions on the law of treaties; surely no such reason exists in the present case.

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[445] See Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels: Bruylant, 2006), p. 808, para. 16. See also Giorgio Gaja, "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago* (Milan: A. Giuffrè, 1987), p. 324; D.W. Greig, (footnote 432 above), pp. 127 ff.; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), p. 127.

[446] P.-H. Imbert, "*À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités. Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire*", *Annuaire Français de Droit International*, vol. XXVI (1980), pp. 524-541; G. Gaja, (footnote 445 above) pp. 323-324; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 245-250; D. Müller, (footnote 445 above) pp. 821-822, para. 48.

[447] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8), p. 55, para. 185.

[448] The 90-day period continued to be applied, however, to the acceptance of late reservations for which unanimous acceptance by the contracting States is generally required (*ibid.*, pp. 61-62, paras. 205-206).

[449] *Ibid.*, pp. 54-55, paras. 184-187.

[450] Memorandum from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See paragraphs (8) and (9) of the commentary to guideline 2.3.2, *Yearbook ... 2001*, vol. II, Part Two, p. 190. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publications, 1999), p. 102).

(7) For the same reason, while the expression "unless the treaty otherwise provides" is self-evident, given the relevant provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide, the Commission felt that it would be useful to retain this wording in guideline 2.6.13. A review of the *travaux préparatoires* of article 20, paragraph 5, of the 1969 Vienna Convention in fact explains why this expression was included and thus justifies its retention. Indeed, this phrase ("unless the treaty otherwise provides") was included in response to an amendment proposed by the United States of America.[451] The United States representative to the Conference explained that an amendment had been proposed because

> "[t]he Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months".[452]

Thus, the United States amendment was not directed specifically at the 12-month period established by the Commission, but sought only to make it clear that it was merely a voluntary residual rule that in no way precluded treaty negotiators from establishing a different period.[453]

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[451] A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 136.

[452] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Documents of the Conference, Summary records* (A/CONF.39/11), 21st meeting, 10 April 1968, p. 108, para. 13.

[453] José María Ruda argues, however, that the United States amendment emphasizes the "residual character of Article 20, paragraph 5" ("Reservations to Treaties", *Recueil des cours ...*, vol. 146 (1975-III), p. 185).

(8) The second case covered by guideline 2.6.13 involves States and international organizations that do not acquire "contracting status" until after the 12-month time period following the date they received notification has elapsed. In this case, the States and international organizations may make an objection up until the date on which they express their consent to be bound by the treaty, which, obviously, does not prevent them from doing so before that date.

(9) This solution of drawing a distinction between contracting States and those that have not yet acquired this status *vis-à-vis* the treaty was contemplated in J.L. Brierly's proposals but was not taken up by either H. Lauterpacht or G.G. Fitzmaurice nor retained by the International Law Commission in the articles adopted on first reading in 1962,[454] even though H. Waldock had included it in the draft article 18 presented in his 1962 report.[455] In the end, it was reintroduced during the second reading in order to address the criticism voiced by the Australian Government, which was concerned about the practical problems that might arise when the principle of tacit acceptance was actually applied.[456]

(10) However, this solution in no way places States and international organizations that are not contracting parties at the time the reservation is notified in a position of inequality *vis-à-vis* the contracting parties. On the contrary, one should not lose sight of the fact that under article 23, paragraph 1, any reservation that has been formulated must be notified not only to the contracting parties but also to other States and international organizations entitled to become parties to the treaty.[457] States and international organizations "entitled to become parties to the treaty" thus have all the information they need with regard to reservations to a specific treaty and also have a period for reflection that is at least as long[458] as that given to contracting parties (12 months).

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[454] Indeed, draft article 19, paragraph 3, presented in the Commission's report to the General Assembly concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, p. 176.

[455] A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 61-62.

[456] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 45 and p. 53, para. 17.

[457] See also guideline 2.1.5, first paragraph.

[458] Draft article 18, paragraph 3 (b), in H. Waldock's first report formulated the same rule as an exception to observance of the 12-month period, stipulating that a State that was not a party to the treaty "shall not be deemed to have consented to the reservation if it shall subsequently [i.e. after the 12-month period has elapsed] lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty" (*Yearbook ... 1962*, vol. II, p. 61).

2.6.14 Conditional objections

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

Commentary

(1) Guideline 2.6.13 provides only a partial response with respect to the date from which an objection to a reservation may be formulated. It does state that the time period during which the objection may be formulated commences when the reservation is notified to the State or international organization that intends to make an objection, in accordance with guideline 2.1.6, which implies that the objection may be formulated as from that date. This does not necessarily mean, however, that it may not be made earlier. Similarly, the definition of objections adopted by the Commission in guideline 2.1.6 provides that a State or an international organization may make an objection "*in response to a reservation to a treaty formulated* by another State or another international organization",[459] which would seem to suggest that an objection may be made by a State or an international organization only after a reservation has been *formulated*. *A priori*, this would seem quite logical, but in the Commission's view this conclusion is hasty.

(2) State practice in fact demonstrates that States also raise objections for "pre-emptive" purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention on the Law of Treaties:

> "The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention."[460]

In the same vein, Japan raised the following objection:

> "The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect

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[459] Italics added.

[460] *Multilateral Treaties* ..., vol. II, p. 421 (chap. XXIII.1).

> of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation."[461]

However, in the second part of this objection the Japanese Government noted that the effects of this objection should apply *vis-à-vis* the Syrian Arab Republic and Tunisia. It went on to reiterate its declaration to make it clear that the same effects should be produced *vis-à-vis* the German Democratic Republic and the Union of Soviet Socialist Republics, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.[462] Other States, for their part, have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.[463]

(3) The Japanese objection to the reservations formulated by the Government of Bahrain and the Government of Qatar to the 1961 Vienna Convention on Diplomatic Relations also states that not only are the two reservations specifically concerned not regarded as valid, but that this [Japan's] "position is applicable to any reservations to the same effect to be made in the future by other countries".[464]

(4) The objection of Greece regarding the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in the category of advance objections. It states:

> "We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto."[465]

A general objection was also raised by the Netherlands concerning the reservations to article IX of the same convention. Although this objection lists the States that had already formulated such a reservation, it concludes: "The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which *will* make such reservation a party to the Convention." That objection was, however, withdrawn in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Hungary, Bulgaria and Mongolia which had, for their part, withdrawn their reservations.[466]

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[461] *Ibid.*, pp. 413-414.

[462] *Ibid.*

[463] See, for example, the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (*ibid.*, pp. 413-417).

[464] *Ibid.*, vol. I, p. 96 (chap. III.3).

[465] *Ibid.*, p. 132 (chap. IV.1). Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (*ibid.*).

(5) State practice is therefore far from uniform in this regard. The Commission believes that there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections, before a reservation has been formulated or, in the case of reservations already formulated, from declaring in advance its opposition to any similar or identical reservation.

(6) Such objections do not, of course, produce the effects contemplated in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions until a corresponding reservation is formulated by another contracting State or contracting organization. This situation is rather similar to that of a reservation formulated by a State or international organization that is a signatory but not yet a party, against which another State or organization has raised an objection; objections of this kind do not produce their effects until the reserving State expresses its consent to be bound by the treaty.[467] Similarly, a pre-emptive objection produces no effect so long as no reservation relating to its provisions is formulated; it nevertheless constitutes notice that its author will not accept certain reservations. As the International Court of Justice noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding reservation that such a reservation will be met with an objection.[468]

(7) The Commission has decided to call this category of objections "conditional objections". They are in fact formulated on the condition that a corresponding reservation will actually be formulated by another State or international organization. Until this condition is met, the objection remains ineffective and does not produce the legal effects of a "conventional" objection.

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[466] *Ibid.*

[467] See guideline 2.6.12 above.

[468] See the citations from the Court's advisory opinion of 1951 in paragraph (5) of the commentary to guideline 2.6.12 above.

(8) Nevertheless, the Commission refrained from specifying in guideline 2.6.14 the effects that such a conditional objection might produce once the condition was met, i.e. once a corresponding reservation was formulated. This question has nothing to do with the formulation of objections, but rather with the effects they produce.

2.6.15 Late objections

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

Commentary

(1) Just as it is possible to formulate an objection in advance, there is nothing to prevent States or international organizations from formulating objections late, in other words after the end of the 12-month period (or any other time period specified by the treaty), or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the 12-month period.[469]

(2) This practice is far from uncommon. In a study published in 1988, F. Horn found that of 721 objections surveyed, 118 had been formulated late,[470] and this figure has since increased.[471] Many examples can be found[472] relating to human rights treaties,[473] but also to treaties covering subjects as diverse as the law of treaties,[474] or the fight against terrorism,[475]

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[469] See guideline 2.6.13 above.

[470] F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institute, 1988), p. 206. See also R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 264-265.

[471] R. Riquelme Cortado, *ibid.*, p. 265.

[472] The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as "communications". The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

[473] See the very comprehensive list drawn up by R. Riquelme Cortado, (footnote 470 above), p. 265 (note 316).

[474] *Ibid.*, p. 265 (note 317).

[475] See the late objections to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties ...*, vol. II, pp. 151-152, note 7 (chap. XVIII.9, note 5)); or the late objections to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004): Russian Federation (7 June 2005) and Argentina (22 August 2005); declaration by Jordan (28 August 2003): Belgium (24 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005); Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the

as well as with respect to the Convention on the Safety of United Nations and Associated Personnel[476] and the 1998 Rome Statute of the International Criminal Court.[477]

(3) This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express - in the form of objections - their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect. As it happens, the position of the States and international organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, in general not as objections but as "communications".[478] Furthermore, an objection, even a late objection, is important in that it may lead, or contribute, to a reservations dialogue.[479]

Syrian Arab Republic (24 April 2005): Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Democratic People's Republic of Korea (12 November 2001, at the time of signature; as the State has not ratified the Convention, the reservation has not been confirmed): Republic of Moldova (6 October 2003), Germany (17 June 2004), Argentina (22 August 2005) (*ibid.*, pp. 197-200, notes 6, 7, 11 and 12 (chap. XVIII.11)).

[476] See the late objections by Portugal (15 December 2005) concerning the declaration by Turkey (9 August 2004) (*ibid.*, p. 130, note 5 (chap. XVIII.8)).

[477] See the late objections by Ireland (28 July 2003), the United Kingdom (31 July 2003), Denmark (21 August 2003) and Norway (29 August 2003) to the interpretative declaration (considered by objecting States to constitute a prohibited reservation) by Uruguay (28 June 2002) (*ibid.*, pp. 164-165, note 8 (chap. XVIII.10)).

[478] *Summary of practice* ... (ST/LEG/7/Rev.1, New York, 1997, para. 213): "taking into account the indicative value of this provision in the Vienna Convention [article 20, paragraph 5], the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it 'communication' when informing the parties concerned of the deposit of the objection". In *Multilateral Treaties Deposited with the Secretary-General*, however, several examples of late objections are given in the section "Objections". This is the case, for example, for the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the 1961 Vienna Convention on Diplomatic Relations. While the objection was very late concerning the reservation made by Bahrain, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a "communication" (*Multilateral Treaties* ..., vol. I, p. 96 (chap. III.3)).

[479] Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on the Rights of the Child (*ibid.*, vol. I, p. 345, note 15 (chap. IV.11)). Roberto Baratta considered that "objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it" (*Gli effetti delle riserve ai trattati* (Milan: Giuffré, 1999) pp. 319-320).

(4) However, it follows from article 20, paragraph 5, of the Vienna Conventions that if a State or international organization has not raised an objection by the end of the 12-month time period following the formulation of the reservation or by the date on which it expresses its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into the details of the effects of this type of tacit acceptance, suffice it to say that the effect of such an acceptance is, in principle, that the treaty enters into force between the reserving State or international organization and the State or organization considered as having accepted the reservation. This result cannot be called into question by an objection formulated several years after the treaty has entered into force between the two States or international organizations without seriously affecting legal security.

(5) States seem to be aware that a late objection cannot produce the normal effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required 12-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished "to place on record that they take the same view [in other words, that they were unable to accept the reservation] of the similar reservation [to that of Rwanda] made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973".[480] It is clear that the British objection to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect it to produce the legal effects of an objection formulated within the period specified by article 20, paragraph 5, of the 1969 Vienna Convention.

(6) The communication of 21 January 2002 by the Peruvian Government in relation to a late objection by Austria[481] - only a few days late - concerning its reservation to the 1969 Vienna Convention on the Law of Treaties is particularly interesting:

> "[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating

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[480] *Multilateral Treaties Deposited with the Secretary-General ...*, p. 133 (chap. IV.1).

[481] This late objection was notified as a "communication" (*ibid.*, vol. II, pp. 419-420, note 19 (chap. XXIII.1)).

> its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.
>
> As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...).' The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.
>
> Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner."[482]

Although it would appear excessive to consider the Austrian communication as being completely devoid of legal effect, the Peruvian communication shows very clearly that a late objection does not preclude the presumption of acceptance under article 20, paragraph 5, of the Vienna Conventions.

(7) It follows from the above that while a late objection may constitute an element in determining the validity of a reservation, it cannot produce the "normal" effects of an objection of the type provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.[483]

(8) Some members of the Commission feel that these late declarations do not constitute "objections", given that they are incapable of producing the effects of an objection. Terms such

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[482] *Ibid.*

[483] This does not prejudge the question of whether, and how, the reservation presumed to be accepted produces the "normal" effect provided for under article 21, paragraph 1, of the Vienna Conventions.

as "declaration", "communication" or "objecting communication" have been proposed. The Commission considers, however, that such declarations correspond to the definition of objections contained in guideline 2.6.1 as it relates to guideline 2.6.13. As the commentary to guideline 2.6.5 notes,[484] an objection (like a reservation) is defined not by the effects it produces but by those that its author wishes it to produce.

(9) The wording of guideline 2.6.15 is sufficiently flexible to accommodate established State practice where late reservations are concerned. While it does not prohibit States or international organizations from formulating objections after the time period required by guideline 2.6.13 has elapsed, it spells out explicitly that they do not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations

Commentary

(1) The question of the withdrawal of objections to reservations, like that of the withdrawal of reservations, is addressed only very cursorily in the Vienna Conventions.[485] There are merely some indications as to how objections may be withdrawn and when such withdrawals become operative. The modification of objections is not addressed at all.

(2) Article 22, paragraphs 2 and 3, of the 1986 Vienna Convention provides as follows:

> "2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
>
> 3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> (*a*) [...]
>
> (*b*) the withdrawal of an objection to a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State."

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[484] See in particular paragraph (4) of the commentary.

[485] Especially concerning the effects of the withdrawal of reservations. See R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 3 (1970), p. 314.

Article 23, paragraph 4, stipulates how objections may be withdrawn:

> "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

(3) The *travaux préparatoires* of the Vienna Conventions are equally inconclusive on the withdrawal of objections. The question is not dealt with at all in the work of the early special rapporteurs; this is hardly surprising, given their advocacy of the traditional theory of unanimity, which logically precluded the possibility of an objection being withdrawn. Just as logically, it was the first report by H. Waldock, who favoured the flexible system, which contained the first proposal for a provision concerning the withdrawal of objections to reservations. He proposed the following text for draft article 19, paragraph 5:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty."[486]

After major reworking of the provisions on the form and procedure relating to reservations and objections, this draft article - which simply reiterated *mutatis mutandis* the similar provision on the withdrawal of a reservation[487] - was abandoned; the reasons for this are not clear from the Commission's work. No such provision is to be found in either the text adopted on first reading or in the Commission's final draft.

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[486] *Yearbook ... 1962*, vol. II, p. 62.

[487] Draft article 17, paragraph 6, provided as follows: "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty" (*ibid.*, p. 61). The similarity between the two texts was highlighted by H. Waldock, who considered in the commentary on draft article 19, paragraph 5, that the latter provision reflected paragraph 6 of draft article 17 and "[did] not therefore need further explanation" (*ibid.*, p. 68, paragraph (22) of the commentary).

(4) It was only during the Vienna Conference that the issue of the withdrawal of objections was reintroduced into the text of articles 22 and 23, based on a Hungarian amendment[488] which realigned the procedure for the withdrawal of objections with that of withdrawal of reservations. As Ms. Bokor-Szegó explained on behalf of the Hungarian delegation:

> "If a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice."[489]

The representative of Italy at the Conference also argued in favour of aligning the procedure for the withdrawal of an objection to a reservation with that for the withdrawal of a reservation:

> "The relation between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counter-balanced by the extinction of a counter-claim or the withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making."[490]

(5) However, there is virtually no State practice in this area. F. Horn could only identify one example of a clear, definite withdrawal of an objection.[491] In 1982 the Cuban Government notified the Secretary-General of the withdrawal of objections it had made when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the reservations to articles IX and XII formulated by several socialist States.[492]

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[488] A/CONF.39/L.18, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 267. The Hungarian amendment was adopted, with a slight modification, by 98 votes to none (*United Nations Conference on the Law of Treaties, Official Records, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings* (A/CONF.39/11/Add.1), eleventh plenary meeting, 30 April 1969, para. 41).

[489] *Ibid.*, para. 14.

[490] *Ibid.*, para. 27.

[491] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institute, 1988), p. 227.

[492] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, p. 134, note 30 (chap. IV.1).

(6) Although the provisions of the Vienna Convention do not go into detail on the issue of withdrawal of objections, it is clear from the *travaux préparatoires* that, in principle, the withdrawal of objections ought to follow the same rules as the withdrawal of reservations, just as the formulation of objections follows the same rules as the formulation of reservations.[493] To make the relevant provisions clear and specific, the Commission based itself on the draft guidelines already adopted on the withdrawal (and modification) of reservations,[494] making the necessary changes to take account of the specific nature of objections. However, this should not be seen in any way as an attempt to implement the theory of parallelism of forms;[495] it is not a matter of aligning the procedure for the withdrawal of objections with the procedure for their formulation, but of applying the same rules to the withdrawal of an objection as those applicable to the withdrawal of a reservation. The two acts, of course, have different effects on treaty relations and differ in their nature and their addressees. Nevertheless, they are similar enough to be governed by comparable formal systems and procedures, as was suggested during the *travaux préparatoires* of the 1969 Vienna Convention.

(7) Like those relating to the withdrawal and modification of reservations, the guidelines contained in this section concern, respectively: the form and procedure for withdrawal; the effects of withdrawal; the time at which withdrawal of the objection produces those effects; partial withdrawal; and the possible widening of the scope of the objection.

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

Commentary

(1) The question of the possibility of withdrawing an objection and the time at which it is withdrawn is answered in the Vienna Conventions, in particular in article 22, paragraph 2.[496] Neither the possibility of withdrawing an objection at any time nor the time at which it may be

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[493] See the commentary to guideline 2.6.9, paragraphs (1) to (6).

[494] Guidelines 2.5.1 to 2.5.11. For the relevant texts and commentaries, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 183-188.

[495] See *ibid.*, pp. 212-213, paragraph (6) of the commentary to guideline 2.5.4.

[496] See paragraph (2) of the introductory commentary to section 2.7.

withdrawn require further elaboration, and the provisions of article 22, paragraph 2, of the Vienna Conventions are in themselves sufficient. Moreover, there is virtually no State practice in this area. Guideline 2.7.1 thus simply reproduces the text of the Vienna Conventions.

(2) While in principle it would be prudent to align the provisions relating to the withdrawal of objections with those relating to the withdrawal of reservations,[497] it must be noted that there is a significant difference in the wording of paragraph 1 (relating to the withdrawal of reservations) and that of paragraph 2 (relating to the withdrawal of objections) of article 22: whereas paragraph 1 is careful to state, with regard to a reservation, that "the consent of a State which has accepted the reservation is not required for its withdrawal",[498] paragraph 2 does not make the same specification as far as objections are concerned. This difference in wording is logical: in the latter case, the purely unilateral character of the withdrawal is self-evident. This is in fact why the part of the Hungarian amendment,[499] which would have brought the wording of paragraph 2 into line with that of paragraph 1, was set aside at the request of the British delegation,

> "in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point".[500]

This is a convincing rationale for the different wording of the two provisions, which does not need to be revisited.

2.7.2 Form of withdrawal

The withdrawal of an objection to a reservation must be formulated in writing.

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[497] See *ibid., passim.*

[498] On this point, see guideline 2.5.1 and the commentary thereto, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 183-188.

[499] A/CONF.39/L.18, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 267. This amendment resulted in the inclusion of paragraph 2 in article 23 (see paragraph (4) of the introductory commentary to section 2.7 above).

[500] *United Nations Conference on the Law of Treaties, Official Records, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 11th plenary meeting, 30 April 1969, p. 38, para. 31.

Commentary

(1) The answer to the question of the form the withdrawal of an objection should take is likewise to be found in the Vienna Conventions, in article 23, paragraph 4.[501] The requirement that it should be in writing does not call for any lengthy explanations, and the rules of the Vienna Conventions are adequate in themselves: while the theory of parallelism of forms is not accepted in international law,[502] it is certainly reasonable to require a certain degree of formality for the withdrawal of objections, which, like reservations themselves, must be made in writing.[503] A verbal withdrawal would entail considerable uncertainty, which would not necessarily be limited to the bilateral relations between the reserving State or organization and the author of the initial objection.[504]

(2) Guideline 2.7.2 now reproduces the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, which have identical wording.

(3) The form of a withdrawal of an objection to a reservation is thus identical to the form of a withdrawal to a reservation.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

Commentary

(1) None of the provisions contained in either the 1969 or the 1986 Vienna Conventions is useful or specific with regard to questions relating to the formulation and communication of a withdrawal. However, it is abundantly clear from the *travaux préparatoires* of the

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[501] See paragraph (2) of the introductory commentary to section 2.7.

[502] See paragraph (6) of the commentary to guideline 2.5.4, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 212-213.

[503] See paragraph (3) of the commentary to guideline 2.5.2, *ibid.*, p. 202.

[504] Given that the withdrawal of an objection resembles an acceptance of a reservation, it might, in certain circumstances, lead to the entry into force of the treaty *vis-à-vis* the reserving State or organization.

1969 Convention[505] that, as in the case of the formulation of objections and the formulation of reservations,[506] the procedure to be followed in withdrawing unilateral declarations must be identical to that followed when withdrawing a reservation.

(2) It therefore seemed prudent to the Commission simply to take note, within the framework of the Guide to Practice, of this procedural parallelism between the withdrawal of a reservation and the withdrawal of an objection, which holds for the authority competent to make the withdrawal at the international level and the consequences (or, rather, the absence of consequences) of the violation of the rules of internal law at the time of formulation and those of notification and communication of the withdrawal. It would appear that they can be transposed *mutatis mutandis* to the withdrawal of objections. Rather than reproduce, by merely replacing the word "reservation" with the word "objection" in the text, guidelines 2.5.4 (Formulation of the withdrawal of a reservation at the international level),[507] 2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)[508] and 2.5.6 (Communication of withdrawal of a reservation),[509] with the last of these itself referring back to the guidelines concerning the communication of reservations and the role of the depositary; the Commission considered it preferable to refer to all of these guidelines,[510] which apply *mutatis mutandis* to objections.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

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[505] See paragraphs (3) to (6) of the introductory commentary to section 2.7 above.

[506] See guideline 2.6.9 and the commentary thereto, above.

[507] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 184-185 and pp. 210-218.

[508] *Ibid.*, p. 185 and pp. 219-221.

[509] *Ibid.*, p. 185 and pp. 221-226.

[510] The Commission proceeded in a similar manner with guidelines 1.5.2 (which refers back to guidelines 1.2 and 1.2.1), 2.4.3 (which refers back to guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, 2.5.6 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.6.9 (which refers back to guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7).

Commentary

(1) As it did with the withdrawal of reservations,[511] the Commission considered the effects of the withdrawal of an objection in the part devoted to the procedure for withdrawal. However, the question proved to be infinitely more complex: whereas withdrawing a reservation simply restores the integrity of the treaty in its relations between the author of the reservation and the other parties, the effects of withdrawing an objection are likely to be manifold.

(2) Without doubt, a State or an international organization that withdraws its objection to a reservation must be considered to have accepted the reservation. This follows implicitly from the presumption of article 20, paragraph 5, of the Vienna Convention, which considers the lack of an objection by a State or an international organization to be an acceptance. Professor Bowett also asserts that "the withdrawal of an objection to a reservation ... becomes equivalent to acceptance of the reservation".[512]

(3) Yet it is not evident that with the withdrawal of an objection "the reservation has full effect".[513] As it happens, the effects of the withdrawal of an objection or of the resulting "delayed" acceptance can be manifold and complex, depending on factors relating not only to the nature and validity of the reservation, but also - and above all - to the characteristics of the objection itself:[514]

- If the objection was not accompanied by the definitive declaration provided for in article 20, paragraph 4 (b), of the Convention, the reservation produces its "normal" effects as provided for in article 21, paragraph 1;
- If the objection was a "maximum-effect" objection, the treaty enters into effect between the two parties and the reservation produces its full effects in accordance with the provisions of article 21;

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[511] See guideline 2.5.7 (Effect of withdrawal of a reservation) and the commentary thereto, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 186 and pp. 227-231.

[512] D. Bowett, "Reservations to non-restricted multilateral treaties", BYbIL, vol. 48 (1976-1977), p. 88. See also R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 3 (1970) p. 314, and L. Migliorino, "*La revoca di riserve e di obiezioni a riserve*", *Rivista di Diritto internazionale*, vol. 77 (1994), p. 329.

[513] D. Bowett, (footnote 512 above), p. 88.

[514] In this connection see R. Szafarz, (footnote 512 above), p. 314, and L. Migliorino, (footnote 512 above), p. 329.

- If the objection was a cause precluding the treaty from entering into force between all parties pursuant to article 20, paragraph 2, or with regard to the reserving State in application of article 20, paragraph 4, the treaty enters into force (and the reservation produces its effects).

This last situation in particular shows that the effects of the withdrawal of an objection not only relate to whether the reservation is applicable or not, but may also have an impact on the actual entry into force of the treaty.[515] The Commission nevertheless considered it preferable to restrict guideline 2.7.4 to the effects of an objection "on the reservation" and adopted the title of this guideline for that reason.

(4) Not only would it seem difficult to adopt a provision covering all the effects of the withdrawal of an objection, owing to the complexity of the question, but doing so might also prejudge the question of the effects of a reservation and of the acceptance of a reservation. The Commission therefore considered that, owing to the complexity of the effects of the withdrawal of an objection, it would be better to regard the withdrawal of an objection to a reservation as being equivalent to an acceptance and to consider that a State that has withdrawn its objection must be considered to have accepted the reservation, without examining, at the present stage, the nature and substance of the effects of such an acceptance. Such a provision implicitly refers to acceptances and their effects. The question of when these effects occur is the subject of guideline 2.7.5.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Commentary

(1) The Vienna Conventions contain a very clear provision concerning the time at which the withdrawal of an objection becomes operative. Article 22, paragraph 3 (b), of the 1986 Convention states:

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[515] See paragraph (3) of the commentary to guideline 2.7.5 below.

> "3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> (*a*) ...
>
> (*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation."

(2) This provision differs from the corresponding rule on the effective date of withdrawal of a reservation in that, in the latter case, the withdrawal becomes operative "in relation to another contracting State only when notice of it has been received by that State". The reasons for this difference in wording can easily be understood. Whereas withdrawing a reservation hypothetically modifies the content of treaty obligations between the reserving State or international organization and all the other contracting States or organizations, withdrawing an objection to a reservation modifies in principle only the bilateral treaty relationship between the reserving State or organization and the objecting State or organization. Ms. Bokor-Szegó, the representative of Hungary at the 1969 Vienna Conference, explained the difference in the wording between subparagraph (a) and the subparagraph (b) proposed by her delegation as follows:[516]

> "Withdrawal of an objection directly concerned only the objecting State and the reserving State."[517]

(3) However, the effects of withdrawing an objection to a reservation may go beyond this strictly bilateral relationship between the reserving party and the objecting party. All depends on the content and scale of the objection: the result of its withdrawal may even be that a treaty enters into force between all the States and international organizations that ratified it. This occurs in particular when an objection has prevented a treaty from entering into force between the parties to a treaty with limited participation (article 20, paragraph 2, of the Vienna Conventions) or, a less likely scenario, when the withdrawal of an objection allows the reserving State or

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[516] See paragraph (4) of the introductory commentary to section 2.7 above.

[517] *Summary records* (A/CONF.39/11/Add.1), *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 11th plenary meeting, 30 April 1969, pp. 36-37, para. 14.

international organization to be a party to the treaty in question and thus brings the number of parties up to that required for the treaty's entry into force. Accordingly, it could be questioned whether it is legitimate that the effective date of withdrawal of an objection to a reservation should depend solely on when notice of that withdrawal is given to the reserving State, which is certainly the chief interested party but not necessarily the only one. In the above-mentioned situations, limiting the requirement to give notice in this way means that the other contracting States or organizations are not in a position to determine the exact date when the treaty enters into force.

(4) This disadvantage appears to be more theoretical than real, however, since the withdrawal of an objection must be communicated not only to the reserving State but also to all the States and organizations concerned or to the depositary of the treaty, who will transmit the communication.[518]

(5) The other disadvantages of the rule setting the effective date at notification of the withdrawal were presented in the context of the withdrawal of reservations in the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation).[519] They concern the immediacy of that effect, on the one hand, and, on the other, the uncertainty facing the author of the withdrawal as to the date notification is received by the State or international organization concerned. The same considerations apply to the withdrawal of an objection, but there they are less problematic. As far as the immediacy of the effect of the withdrawal is concerned, it should be borne in mind that the chief interested party is the author of the reservation, who would like the reservation to produce all its effects on another contracting party: the quicker the objection is withdrawn, the better it is from the author's perspective. It is the author of the objection, meanwhile, who determines this notification and who must make the necessary preparations (including the preparation of domestic law) to ensure that the withdrawal produces all its effects (and, in particular, that the reservation is applicable in the relations between the two States).

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[518] This follows from guideline 2.7.3 and of guidelines 2.5.6 (Communication of withdrawal of a reservation) and 2.1.6 (Procedure for communication of reservation), to which it refers. Consequently, the withdrawal of the objection must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

[519] See the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 231-239.

(6) In view of these considerations and in keeping with the Commission's practice, it does not seem necessary to modify the rule set forth in article 22, paragraph 3 (b), of the Vienna Convention. Taking into account the recent practice of the principal depositaries of multilateral treaties and, in particular, that of the Secretary-General of the United Nations,[520] who use modern, rapid means of communication to transmit notifications, States and international organizations other than the reserving State or organization should normally receive the notification at the same time as the directly interested party. Simply reproducing this provision of the Vienna Convention would thus seem justified.

(7) In accordance with the practice followed by the Commission, guideline 2.7.5 is thus identical to article 22, paragraph 3 (b), of the 1986 Vienna Convention, which is more comprehensive than the corresponding 1969 provision in that it takes into account international organizations, without altering the meaning in any way. It is for this very reason that, notwithstanding the view of some of its members, the Commission decided not to replace the phrase "becomes operative" in the English text with the phrase "takes effect", which would seem to mean the same thing.[521] This linguistic problem arises only in the English version of the text.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

Commentary

(1) For the reasons given in the commentary to guideline 2.5.9 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation),[522] the Commission felt it necessary to adopt a draft guideline that was analogous in order to cover the situation in

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[520] See paragraphs (14) to (18) of the commentary to guideline 2.1.6 (Procedure for communication of reservations) above. See also Palitha T.B. Kohona, "Some notable developments in the practice of the United Nations Secretary-General as depositary of multilateral treaties: reservations and declarations", AJIL, vol. 99 (2005), pp. 433-450, and "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33 (2004-2005), pp. 415-450.

[521] See also paragraph (3) of the commentary to guideline 2.7.6 and paragraph (5) of the commentary to guideline 2.7.7 below.

[522] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 242-244.

which the objecting State or international organization unilaterally sets the effective date of withdrawal of its objection, without, however, entirely reproducing the former draft guideline.

(2) In fact, in the case where the author of the objection decides to set as the effective date of withdrawal of its objection a date earlier than that on which the reserving State received notification of the withdrawal, a situation corresponding *mutatis mutandis* to subparagraph (b) of guideline 2.5.9,[523] the reserving State or international organization is placed in a particularly awkward position. The State or international organization that has withdrawn its objection is considered as having accepted the reservation, and may therefore, in accordance with the provisions of article 21, paragraph 1, invoke the effect of the reservation on a reciprocal basis: the reserving State or international organization would then have incurred international obligations without being aware of it, and this could seriously undermine legal security in treaty relations. It is for this reason that the commission decided quite simply to rule out this possibility and to omit it from guideline 2.7.9. As a result, only a date later than the date of notification may be set by an objecting State or international organization when withdrawing an objection.

(3) In the English version of guideline 2.7.6, the phrase "becomes operative", which some English-speaking members of the Commission found awkward, was nevertheless retained by the Commission because it is used in article 22, paragraph 3 (b), of the Vienna Conventions and also in guideline 2.7.5.[524] The phrase simply means "takes effect". This linguistic problem does not arise in any of the other language versions.

2.7.7 Partial withdrawal of an objection

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

Commentary

(1) As with the withdrawal of reservations, it is quite conceivable that a State (or international organization) might modify an objection to a reservation by partially withdrawing it. If a State or

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[523] *Ibid.*, pp. 243-244, paragraphs (4) and (5) of the commentary to guideline 2.5.9.

[524] See paragraph (7) of the commentary to guideline 2.7.5 above and paragraph (5) of the commentary to guideline 2.7.7 below.

an international organization can withdraw its objection to a reservation at any time, it is hard to see why it could not simply reduce its scope. Two quite different situations illustrate this point:

- In the first place, a State might change an objection with "maximum"[525] or intermediate[526] effect into a "normal" or "simple" objection:[527] in such cases, the modified objection will produce the effects foreseen in article 21, paragraph 3. Moving from an objection with maximum effect to a simple objection or one with intermediate effect also brings about the entry into force of the treaty as between the author of the reservation and the author of the objection;[528]
- In the second place, it would appear that there is nothing to prevent a State from "limiting" the actual content of its objection (by accepting certain aspects of reservations that lend themselves to being separated out in such a way)[529] while maintaining its principle: in this case, the relations between the two States are governed by the new formulation of the objection.

(2) The Commission has no knowledge of a case in State practice involving such a partial withdrawal of an objection. This does not, however, appear to be sufficient ground for ruling out such a hypothesis. In his first report, H. Waldock expressly provided for the possibility of a

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[525] An objection with "maximum" effect is an objection in which its author expresses the intention of preventing the treaty from entering into force as between itself and the author of the reservation in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Conventions. See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 199, paragraph (22) of the commentary to guideline 2.6.1.

[526] By making an objection with "intermediate" effect, a State expresses the intention to enter into treaty relations with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions. See *ibid.*, p. 199, paragraph (23) of the commentary to guideline 2.6.1.

[527] "Normal" or "simple" objections are those with "minimum" effect, as provided for in article 21, paragraph 3, of the Vienna Conventions. See *ibid.*, p. 199, paragraph (22) of the commentary to guideline 2.6.1.

[528] If, on the contrary, an objection with "super-maximum" effect were abandoned and replaced by an objection with maximum effect, the treaty would no longer be in force between the States or international organizations concerned; even if an objection with super-maximum effect is held to be valid, that would enlarge the scope of the objection, which is not possible (see guideline 2.7.9 and the commentary thereto below). An objection with "super-maximum" effect states not only that the reservation to which the objection is made is not valid, but also that, consequently, the treaty applies *ipso facto* as a whole in the relations between the two States. See *ibid.*, p. 200, paragraph (24) of the commentary to guideline 2.6.1.

[529] In some cases, the question of whether, in the latter hypothesis, it is really possible to speak of a "limitation" of this kind is debatable - but neither more nor less than the question of whether modifying a reservation is tantamount to its partial withdrawal.

partial withdrawal of this kind. Paragraph 5 of draft article 19, which was devoted entirely to objections but subsequently disappeared in the light of changes made to the structure of the draft articles, states:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or *in part*, at any time."[530]

The commentaries to this provision[531] presented by the Special Rapporteur offer no explanation of the reasons why he proposed it. Nonetheless, it is noteworthy that this draft article 19, paragraph 5, was again identical to the corresponding proposal concerning the withdrawal of reservations,[532] as was made explicit in H. Waldock's commentary.[533]

(3) The arguments which led the Commission to allow for the possibility of partial withdrawal of reservations[534] may be transposed *mutatis mutandis* to partial withdrawal of objections, even though in this case the result is not to ensure a more complete application of the provision of the treaty but, on the contrary, to give full effect (or greater effect) to a reservation. Consequently, just as partial withdrawal of a reservation follows the rules applicable to full withdrawal,[535] it would seem that the procedure for the partial withdrawal of an objection should be modelled on that of its total withdrawal. Guideline 2.7.7 has been formulated to reflect this.

(4) Given the problems inherent in determining the effects of total withdrawal of an objection in the abstract,[536] the Commission felt that it was neither possible nor necessary to define the term "partial withdrawal" any further. It was enough to say that partial withdrawal is necessarily something less than full withdrawal and that it limits the legal effects of the objection *vis-à-vis*

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[530] *Yearbook ... 1962*, vol. II, p. 62 (italics added).

[531] *Ibid.*, p. 68.

[532] See draft article 17, paragraph 6, *ibid.*, p. 61.

[533] *Ibid.*, p. 68.

[534] See the commentary to guideline 2.5.10 (Partial withdrawal of a reservation), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paragraphs (11) and (12) of the commentary.

[535] See the second paragraph of guideline 2.5.10 (Partial withdrawal of a reservation): "The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions."

[536] See the commentary to guideline 2.7.4 above.

the reservation without wiping them out entirely: as the above examples show, the reservation is not simply accepted; rather, the objecting State or international organization merely wishes to alter slightly the effects of an objection which, in the main, is maintained.

(5) In the English version of guideline 2.7.7, the phrase "becomes operative", which is perhaps awkward, was retained by the Commission on account of its use in article 22, paragraph 3 (b), of the Vienna Conventions and also in guidelines 2.7.5 and 2.7.6.[537] The phrase simply means "takes effect". This linguistic problem does not arise in any of the other language versions.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

Commentary

(1) It is difficult to determine *in abstracto* what effects are produced by the withdrawal of an objection and even more difficult to say with certainty what concrete effect a partial withdrawal of an objection is likely to produce. In order to cover all possible effects, the Commission wanted to adopt a guideline that was sufficiently broad and flexible. It considered that the wording of guideline 2.5.11 concerning the effects of a partial withdrawal of a reservation[538] met this requirement. Consequently, guideline 2.7.8 is modelled on the analogous guideline dealing with the partial withdrawal of a reservation.

(2) While the text of guideline 2.7.8 does not explicitly say so, it is clear that the term "partial withdrawal" implies that by partially withdrawing its objection, the State or international organization that is the author of the objection intends to limit the legal effects of the objection, it being understood that this may prove fruitless if the legal effects of the reservation are already weakened as a result of problems relating to the validity of the reservation.

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[537] See paragraph (7) of the commentary to guideline 2.7.5 and paragraph (3) of the commentary to guideline 2.7.6.

[538] See guideline 2.5.11 (Effect of a partial withdrawal of a reservation), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 256.

(3) The objection itself produces its effects independently of any reaction on the part of the author of the reservation. If States and international organizations can make objections as they see fit, they may similarly withdraw them or limit their legal effects at will.

2.7.9 Widening of the scope of an objection to a reservation

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

Commentary

(1) Neither the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions nor the text of the Conventions themselves contain any provisions or indications on the question of the widening of the scope of an objection previously made by a State or international organization, and there is no State practice in this area.

(2) In theory it is conceivable that a State or international organization that has already raised an objection to a reservation may wish to widen the scope of its objection, for example by adding the declaration provided for in article 20, paragraph 4 (b) of the Vienna Conventions, thereby transforming it from a simple objection, which does not preclude the entry into force of the treaty as between the objecting and reserving parties, into a qualified objection, which precludes any treaty-based relations between the objecting and reserving parties.

(3) In the view of some Commission members, this example alone demonstrates the problems of legal security that would result from such an approach. They argue that any hint of an intention to widen or enlarge the scope of an objection to a reservation could seriously undermine the status of the treaty in the bilateral relations between the reserving party and the author of the new objection. Since in principle the reserving party does not have the right to respond to an objection, to allow the widening of the scope of an objection would amount to exposing the reserving State to the will of the author of the objection, who could choose to change the treaty relations between the two parties at any time. The lack of State practice suggests that States and international organizations consider that widening the scope of an objection to a reservation is simply not possible.

(4) Other considerations, according to this point of view, support such a conclusion. In its work on reservations, the Commission has already examined the similar issues of the widening of the scope of a reservation[539] and the widening of the scope of a conditional interpretative declaration.[540] In both cases the widening is understood as the late formulation of a new reservation or a new conditional interpretative declaration.[541] Because of the presumption of article 20, paragraph 5, of the Vienna Conventions, the late formulation of an objection cannot be said to have any legal effect.[542] Any declaration formulated after the end of the prescribed period is no longer considered to be an objection properly speaking but a renunciation of a prior acceptance, without regard for the commitment entered into with the reserving State,[543] and the practice of the Secretary-General as depositary of multilateral treaties bears out this conclusion.[544]

(5) Other Commission members, however, held that a reading of the provisions of the Vienna Conventions does not justify such a categorical solution. Under article 20, paragraph 5, States and international organizations are given a specific time period within which to make their objections, and there is nothing to prevent them from widening or reinforcing their objections during that period; for practical reasons, then, it is appropriate to give States such a period for reflection.

(6) A compromise was nevertheless reached between the two points of view. The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the author of the reservation and the author of the objection. Making a simple objection that does not imply an intention to preclude the entry into force of the treaty between the author of the objection and the author of the reservation may indeed have the immediate effect of establishing treaty relations between the two parties, even before the time

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[539] See guideline 2.3.5 (Widening of the scope of a reservation) and the commentary thereto, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), p. 260 and pp. 269-274.

[540] See guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration) and the commentary thereto, *ibid.*, pp. 263 and 277-278.

[541] See paragraph (1) of the commentary to guideline 2.3.5 (Widening of the scope of a reservation), *ibid.*, p. 269, and paragraph (1) of the commentary to guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration), *ibid.*, p. 277.

[542] See also guideline 2.6.15 above.

[543] See the commentary to guideline 2.6.15 above.

[544] *Ibid.*, paragraph (4) of the commentary.

period allowed for the formulation of objections has elapsed. To call this *fait accompli* into question by subsequently widening the scope of the objection and accompanying it with a clear expression of intent to preclude the entry into force of the treaty in accordance with article 20, paragraph 4 (b), of the Vienna Convention is inconceivable and seriously undermines legal security.

(7) The guideline reflects this compromise. It does not prohibit the widening of objections within the time period prescribed in guideline 2.6.13 - which simply reproduces the provision contained in article 20, paragraph 5, of the Vienna Conventions - provided that such widening does not modify treaty relationships. Widening is thus possible if it is done before the expiry of the 12-month period (or any other period stipulated in the treaty) that follows notification of the reservation or before the date on which the State or international organization that made the objection expresses its consent to be bound by the treaty, if it is later and if it does not call into question the very existence of treaty relations acquired subsequently through the formulation of the initial objection.

2.8 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

Commentary

(1) In accordance with paragraph 5 of article 20[545] of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986:

> "For the purposes of paragraphs 2 and 4,[[546]] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international

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[545] This article is entitled "Acceptance of and objection to reservations". Unlike the English text, the French version of the two Vienna Conventions keeps the word "acceptance" in the singular but leaves "objections" in the plural. This distortion, which appeared in 1962 (see *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 248 and *Yearbook ... 1962*, vol. I, p. 223 (text adopted by the Drafting Committee); *Yearbook ... 1962*, vol. II, p. 194 and *Yearbook ... 1962*, vol. II, p. 176), was never corrected or explained.

[546] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and constituent acts of international organizations.

organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

(2) It emerges from this definition that acceptance of a reservation can be defined as the absence of any objection. Acceptance is presumed in principle from the absence of an objection, either at the end of the 12-month period following receipt of notification of the reservation or at the time of expression of consent to be bound. In both cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral declaration. This does not mean, however, that acceptance is necessarily tacit; moreover, paragraphs 1 and 3 of article 23 make explicit reference to "express acceptance of a reservation", and such express formulation may be obligatory, as is implied by the phrase "unless the treaty otherwise provides" in article 20, paragraph 5, even if this phrase was inserted in that provision for other reasons,[547] and the omission from the same provision of any reference to paragraph 3 of article 20, concerning the acceptance of a reservation to the constituent instrument of an international organization, which does indeed require a particular form of acceptance.

(3) Guideline 2.8, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance:

- Express acceptance, resulting from a unilateral declaration to that end; and
- Tacit acceptance, resulting from silence or, more specifically, the absence of any objection to the reservation during a certain period of time. This time period corresponds to the time during which an objection may legitimately be made, *i.e.* the period specified in guideline 2.6.13.

(4) It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of

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[547] See paragraph (7) of the commentary to guideline 2.6.13.

acceptance without a unilateral declaration, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to "early" acceptance when the reservation is authorized by the treaty:

> "Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with article 20 (1)."[548]

While these distinctions may have some meaning in academic terms, the Commission did not feel that it was necessary to reflect them in the Guide to Practice, given that they did not have any concrete consequences.

(5) With respect to so-called "early" acceptances, the Commission's commentary on draft article 17 (current article 20) clearly indicates that:

> "Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required."[549]

Under this provision, and unless the treaty otherwise provides, an acceptance is not, in this case, a requirement for a reservation to be established: it is established *ipso facto* by virtue of the treaty, and the reaction of States - whether an express acceptance, tacit acceptance or even an objection - can no longer call this acquired acceptance into question. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect. Moreover, no examples of such an acceptance exist. This does not mean that article 20, paragraph 1, of the Vienna Conventions should not be reflected in the Guide to Practice; however, the provision has much more to do with the effects of a reservation than with formulation or the form of acceptance; accordingly, its rightful place is in the fourth part of the Guide.

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[548] D.W. Greig, (footnote 432 above), p. 118. This article is perhaps the most thorough study of the rules that apply to the acceptance of reservations (see in particular pp. 118-135 and 153).

[549] *Yearbook ... 1966*, vol. II, p. 207, para. 18.

(6) Similarly, the Commission did not feel it appropriate to reflect in the Guide to Practice the distinction made by some authors, based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions, between "tacit" and "implicit" acceptances, depending on whether or not the reservation has already been formulated at the time the other interested party expresses its consent to be bound. In the former case, the acceptance would be "implicit"; in the latter, it would be "tacit".[550] In the former case, States or international organizations are deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months in which to raise an objection, after which it is deemed to have accepted the reservation.

(7) Although the result is the same in both cases - the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time - their grounds are different. With respect to States or international organizations which become contracting parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather by the fact that this State or international organization, aware of the reservations formulated,[551] accedes to the treaty without objecting to the reservations. The acceptance is thus *implied* in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated,[552] hence the notion of "implicit" acceptances. In the case of States or international organizations that are already parties to a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence - generally for a period of 12 months - or, in particular, the absence of any objection on their part which is considered as an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

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[550] D.W. Greig, (footnote 432 above), p. 120; Frank Horn, (footnote 429 above), pp. 125-126; Daniel Müller, (footnote 445 above), p. 816, para. 35.

[551] See article 23, paragraph 1, of the Vienna Convention of 1986, which stipulates that reservations must be "formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". See also guideline 2.1.5 and paragraphs (1) to (16) of the commentary thereto, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 79-97.

[552] See D. Müller, (footnote 445 above), p. 816, para. 36. See also draft article 10, paragraph 5, of J.L. Brierly, [First] Report on the law of treaties, (A/CN.4/23), para. 100; for the English version see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

(8) In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time the reservation is formulated, have time for consideration until the date on which they express their consent to be bound by the treaty, which nevertheless does not prevent them from formulating an acceptance or an objection before that date.[553] The question is one of time period, however, and not one of definition.

(9) Another question relates to the definition itself of tacit acceptances. One may well ask whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof. This paradoxical question stems from the wording of paragraph 4 (b) of article 20. The paragraph states:

> "An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization."

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the "establishment" of the reservation itself). This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations.

(10) Guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. The justification for this is to be found in article 20, paragraph 4, which takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, which provides that the presumption of acceptance applies only to States that are parties to the treaty. Thus, a State or an international organization which on the date that notice of the reservation is given is not yet a contracting

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[553] See also paragraphs (8) and (9) of the commentary to guideline 2.6.5 and paragraphs (8) and (9) of guideline 2.6.13 above.

party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound - that is, on the date when it definitively becomes a contracting State or contracting organization.

(11) It is a different matter, however, for acceptances of reservations to the constituent instruments of international organizations referred to in paragraph 3 of the same article on the one hand and express acceptances on the other. In the latter case, there is nothing to prevent a State or international organization that has not yet expressed its consent to be bound by the treaty from making an express declaration accepting a reservation formulated by another State, even though that express acceptance cannot produce the same legal effects as those described in article 20, paragraph 4, for acceptances made by contracting States or international organizations. The same holds true for any express acceptances by a State or international organization of a reservation to the constituent instrument of an international organization: there is nothing to prevent such express acceptances from being formulated, but they cannot produce the same effects as the acceptance of a reservation to a treaty that does not take this form.

(12) Furthermore, it can be seen both from the text of the Vienna Conventions and their *travaux préparatoires* and from practice that tacit acceptance is the rule and express acceptance the exception. Guideline 2.8, however, is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances.

CHAPTER VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

125. The Commission, at its fifty-fourth session (2002), decided to include the topic "Responsibility of international organizations" in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[554] At the same session, the Commission established a Working Group on the topic. The Working Group in its report[555] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[556]

126. From its fifty-fifth (2003) to its fifty-ninth (2007) sessions, the Commission had received and considered five reports from the Special Rapporteur,[557] and provisionally adopted draft articles 1 to 45 [44].[558]

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[554] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 461-463. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

[555] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 465-488.

[556] *Ibid.*, para. 464.

[557] A/CN.4/532 (first report), A/CN.4/541 (second report), A/CN.4/553 (third report), A/CN.4/564 and Add.1 and 2 (fourth report), and A/CN.4/583 (fifth report).

[558] Draft articles 1 to 3 were adopted at the fifty-fifth session (2003), draft articles 4 to 7 at the fifty-sixth session (2004), draft articles 8 to 16 [15] at the fifty-seventh session (2005), draft articles 17 to 30 at the fifty-eighth session (2006), and draft articles 31 to 45 [44] at the fifty-ninth session (2007).

B. Consideration of the topic at the present session

127. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/597), as well as written comments received so far from international organizations.[559]

128. The Commission considered the sixth report of the Special Rapporteur at its 2960th to 2964th meetings from 9 to 16 May 2008. At its 2964th meeting, on 16 May 2008, the Commission referred draft articles 46 to 51 to the Drafting Committee. At the same meeting, the Commission established a Working Group under the chairmanship of Mr. Enrique Candioti for the purpose of considering the issue of countermeasures as well as the advisability of including in the draft articles a provision relating to admissibility of claims.

129. Upon the recommendation of the Working Group, the Commission, at its 2968th meeting, on 29 May 2008, referred an additional draft article 47 *bis* on admissibility of claims to the Drafting Committee.[560]

130. A majority of its members being in favour of including in the draft articles provisions regulating the issue of countermeasures, the Working Group dealt with a number of related issues. It first considered whether, and to what extent, the legal position of members and non-members of an international organization should be distinguished in that respect. It came to the conclusion that a new draft article should be included, stating that an injured member of an international organization may not take countermeasures against the organization so long as the rules of the organization provide reasonable means to ensure compliance of the organization with

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[559] Following the recommendations of the Commission (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, and corrigendum (A/57/10 and Corr.1), paras. 464 and 488; and *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52), the Secretariat, on an annual basis, has been circulating the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see A/CN.4/545, A/CN.4/547, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, and A/CN.4/593 and Add.1.

[560] Draft article 47 *bis*, as drafted by the Special Rapporteur, read as follows:

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. An injured State or international organization may not invoke the responsibility of another international organization if the claim is subject to any applicable rule on the exhaustion of local remedies and any available and effective remedy has not been exhausted.

its obligations under Part Two of the draft articles. Secondly, the Working Group agreed that the draft articles should specify the need for countermeasures to be taken in a manner respecting the specificity of the targeted organization. Finally, the Working Group recommended that the draft articles should not address the possibility for a regional economic integration organization to take countermeasures on behalf of one of its injured members.

131. At its 2978th meeting, on 15 July 2008, the Commission received the oral report of the Working Group, which was delivered by the Chairman of the Working Group. The Commission referred draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the recommendations of the Working Group.

132. The Commission considered and adopted the report of the Drafting Committee on draft articles 46 to 53 at its 2971st meeting, on 4 June 2008. At its 2989th meeting on 4 August 2008, the Commission adopted the title of Chapter I of Part Three of the draft articles. (sect. C.1 below).

133. At its 2993rd meeting, on 6 August 2008, the Commission adopted the commentaries to the said draft articles. (sect. C.2 below).

134. At its 2989th meeting, on 4 August 2008, the Commission received the report of the Drafting Committee and took note of draft articles 54 to 60 on countermeasures, as provisionally adopted by the Drafting Committee.

1. Introduction by the Special Rapporteur of his sixth report

135. Before introducing his sixth report, the Special Rapporteur indicated that his seventh report would address certain outstanding issues such as the final provisions of the draft articles and the place of the chapter concerning the responsibility of a State in connection with the act of an international organization. The seventh report would also provide the opportunity to respond to comments made by States and international organizations on the draft articles provisionally adopted by the Commission and, as necessary, to propose certain amendments thereto.

136. The sixth report of the Special Rapporteur, dealing with the implementation of the responsibility of international organizations, followed, like the previous reports, the general pattern of the articles on Responsibility of States for internationally wrongful acts. Consistently with the approach adopted in Part Two of the draft articles, the draft articles relating to the

implementation of international responsibility only addressed the invocation of the responsibility of an international organization by a State or another international organization. Moreover, the implementation of the responsibility of a State towards an international organization was outside the scope of the draft articles.

137. Draft article 46[561] provided a definition of an "injured" State or international organization, in line with the criteria laid down in article 42 on State responsibility.

138. Draft articles 47[562] and 48[563] replicated, with minor adjustments, the corresponding provisions on State responsibility. The question arose whether the draft articles should contain a provision, similar to article 44 on State responsibility, dealing with nationality of claims and

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[561] Draft article 46 read as follows:

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured party to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) That State or the former international organization individually;

(*b*) A group of parties including that State or that former international organization, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State or that international organization; or

(ii) Is of such a character as radically to change the position of all the parties to which the obligation is owed with respect to the further performance of the obligation.

[562] Draft article 47 read as follows:

Notice of claim by an injured State or international organization

1. An injured State which invokes the responsibility of an international organization shall give notice of its claim to that organization.

2. An injured international organization which invokes the responsibility of another international organization shall give notice of its claim to the latter organization.

3. The injured State or international organization may specify in particular:

(*a*) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of Part Two.

[563] Draft article 48 read as follows:

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(*a*) The injured State or international organization has validly waived the claim;

(*b*) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

exhaustion of local remedies. In the view of the Special Rapporteur, since the situations in which such requirements would apply in relation to the implementation of the responsibility of an international organization were much more limited than in the context of inter-State relations, a provision on nationality of claims and exhaustion of local remedies could be omitted in the present draft articles.

139. Draft articles 49[564] and 50,[565] concerning, respectively, plurality of injured entities and plurality of responsible entities, were aligned on the corresponding articles on State responsibility, with a specific reference, however, to the case in which the responsibility of a member of an international organization was only subsidiary.

140. Draft article 51,[566] dealing with the invocation of responsibility by an entity other than an injured State or international organization, was based on article 48 on State responsibility.

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[564] Draft article 49 read as follows:

Plurality of injured entities

> Where several entities are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization which has committed the internationally wrongful act.

[565] Draft article 50 read as follows:

Plurality of responsible entities

> 1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each responsible entity may be invoked in relation to that act. However, if the responsibility of an entity is only subsidiary, it may be invoked only to the extent that the invocation of the primary responsibility has not led to reparation.
>
> 2. Paragraph 1:
>
> (*a*) Does not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;
>
> (*b*) Is without prejudice to any right of recourse that the entity providing reparation may have against the other responsible entities.

[566] Draft article 51 read as follows:

Invocation of responsibility by an entity other than an injured State or international organization

> 1. Any State or international organization other than an injured State or organization is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to a group of entities including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.
>
> 2. Any State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

However, some adjustments had been made concerning the right of an international organization to invoke the responsibility of another international organization for a breach of an obligation owed to the international community as a whole. In the light of comments received from States and international organizations, the existence of such a right seemed to depend on whether the organization had a mandate to protect the general interests underlying the obligation in question. This limitation was reflected in paragraph 3 of draft article 51.

141. Draft articles 52,[567] 53,[568] 54,[569] 55[570] and 56[571] on countermeasures were based on the

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3. Any international organization that is not an injured organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and if the organization that invokes responsibility has been given the function to protect the interest of the international community underlying that obligation.

4. Any State or international organization entitled to invoke responsibility under the preceding paragraphs may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 33;

(*b*) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 47 and 48 apply to an invocation of responsibility by a State or international organization entitled to do so under the preceding paragraphs.

[567] Draft article 52 read as follows:

Object and limits of countermeasures

1. An injured State or international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Where an international organization is responsible for an internationally wrongful act, an injured member of that organization may take countermeasures against the organization only if this is not inconsistent with the rules of the same organization.

5. Where an international organization which is responsible for an internationally wrongful act is a member of the injured international organization, the latter organization may take countermeasures against its member only if this is not inconsistent with the rules of the injured organization.

[568] Draft article 53 read as follows:

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

corresponding articles on State responsibility. There seemed to be no reason for excluding, in general terms, that an injured State could take countermeasures against a responsible international organization. Moreover, while practice offered some examples of countermeasures by international organizations against responsible States, several States had taken the view, in their comments addressed to the Commission, that an injured organization could resort, in

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(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. A State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization;

(*b*) To respect the inviolability of the agents of the responsible international organization and of the premises, archives and documents of the same organization.

[569] Draft article 54 read as follows:

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

[570] Draft article 55 read as follows:

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(*a*) Call upon the responsible international organization, in accordance with article 47, to fulfil its obligations under Part Two;

(*b*) Notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (*b*), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased; and

(*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

[571] Draft article 56 read as follows:

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Two in relation to the internationally wrongful act.

principle, to countermeasures under the same conditions as those applicable to States. However, in the relations between an international organization and its members, countermeasures were unlikely to be applicable. Therefore, an exception was made in paragraphs 4 and 5 of draft article 52.

142. Draft articles 57[572] addressed two separate issues. Paragraph 1, which corresponded *mutatis mutandis* to article 54 on State responsibility, was a "without prejudice" clause dealing with "lawful measures" taken against a responsible international organization by a State or another international organization that were not "injured" within the meaning of draft article 46. In the text of draft article 57, paragraph 1, the reference to "article 51, paragraph 1" should read "article 51, paragraphs 1 to 3".

143. Paragraph 2 of draft article 57 concerned the case of a regional economic integration organization to which exclusive competence over certain matters had been transferred by its members. Since the members of the organization would no longer be in a position to resort to countermeasures affecting those matters, the organization would be allowed, at the request of an injured member and on its behalf, to take countermeasures against another organization while respecting the requirement of proportionality.

144. After the adoption of the draft articles on countermeasures, the Commission would be able to fill a gap deliberately left in the chapter relating to circumstances precluding wrongfulness, whereby the drafting of article 19 had been postponed until the examination of the issues relating to countermeasures in the context of the implementation of the responsibility of an international organization. In his seventh report, the Special Rapporteur would examine the additional question of whether draft article 19 should also cover countermeasures by an

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[572] Draft article 57 read as follows:

Measures taken by an entity other than an injured State or international organization

1. This chapter does not prejudice the right of any State or international organization, entitled under article 51, paragraph 1, to invoke the responsibility of an international organization, to take lawful measures against the latter international organization to ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached.

2. Where an injured State or international organization has transferred competence over certain matters to a regional economic integration organization of which it is a member, the organization, when so requested by the injured member, may take on its behalf countermeasures affecting those matters against a responsible international organization.

injured international organization against a responsible State - a question that was not addressed in the context of the implementation of responsibility of international organizations.

2. Summary of the debate

(a) General comments

145. Some members agreed with the suggestion by the Special Rapporteur that, before completing the first reading, the texts of the draft articles provisionally adopted would be reviewed in the light of all available comments from States and international organizations. According to another view, it was not appropriate for the Commission to do so, since the Commission should focus, for the time being, on the elaboration of a coherent set of draft articles without being influenced by political considerations, the second reading was the occasion to take due account of positions of States.

146. It was suggested by some members that a meeting be organized between the Commission and legal advisers of international organizations in order to engage in a concrete discussion of the issues raised by the present topic, including the question of countermeasures.

147. According to a view, it was regrettable that the draft articles submitted by the Special Rapporteur did not deal with the question of implementation by an injured international organization of the responsibility of the wrongdoing State, which meant that the Commission was leaving an unwelcome lacuna in the law of international responsibility.

(b) Countermeasures

(i) General remarks

148. Different opinions were expressed by the members as to the conditions under which international organizations may be the target of, or resort to, countermeasures. While certain members were against the inclusion of draft articles on countermeasures, other members supported their elaboration by the Commission. Several members supported the idea of establishing a Working Group for the purpose of considering the issue of countermeasures.

149. According to some members, there was no reason why countermeasures ought to be confined to inter-State relations. In this regard, it was stated that certain rules applicable to inter-State relations could be extended by analogy to the relations between States and

international organizations, or between international organizations. It was also observed that countermeasures were only a means to ensure respect of the obligations incumbent upon the organization in the field of responsibility. A suggestion was made that the draft articles also cover countermeasures taken by an international organization against a State. However, several members called for a cautious approach with respect to countermeasures by and against international organizations, in view of the limited practice, the uncertainty surrounding their legal regime and the risk of abuse that they would entail. It was also stated that countermeasures should remain exceptional. Some members were of the opinion that countermeasures should not be made available in the situations covered by the present draft articles, as they also believed that countermeasures should not have been accepted in the articles on State responsibility. It was also suggested that any discussion of the possibility for an international organization to resort to countermeasures should be limited to withholding the performance of contractual obligations under treaty relationships involving that organization.

150. Some members were of the view that the relationship between an international organization and its members should be treated differently, as regards countermeasures, from the relationship between an international organization and non-members.

151. Some members pointed to the fact that the practice within the European Union and in its relations with the WTO could not constitute the basis for drawing general rules on the matter. In the case of the European Union, some members thought that this was due to the special nature of the European Union as a highly economically integrated entity while other members emphasized the fact that the European Union member States had lost the capacity to impose countermeasures in the economic field. In the case of the WTO, some members expressed the view that retaliations within the WTO system were contractual in nature and belonged to a special legal regime; it was also stated that such retaliations were subject to the law of treaties rather than to the regime on countermeasures.

152. Divergent views were expressed on whether sanctions imposed by the United Nations Security Council could be regarded as countermeasures. According to several members, such sanctions were subject to a different regime and should therefore remain outside the scope of the topic. In support of this position, reference was made to their punitive character and to their main purpose which was the maintenance of international peace and security rather than the enforcement of obligations under international law. According to another view, sanctions by the

Security Council could be regarded, in certain situations, as countermeasures in their essence, since they were directed against States that had breached international law and were frequently aimed at stopping internationally wrongful acts. The question was also raised as to whether, in case of unlawful sanctions imposed by the Security Council, the targeted States would be entitled to take countermeasures against the organization and those States that implemented them.

153. It was suggested that measures taken by an international organization, in accordance with its internal rules, against its members were to be regarded as sanctions rather than countermeasures. It was also observed that countermeasures must be distinguished from other types of measures, including those taken in the event of a material breach of a treaty obligation, which were governed by the law of treaties.

(ii) Specific comments on the draft articles

154. Some members expressed support, in general terms, for draft articles 52 to 56.

Draft article 52 Object and limits of countermeasures

155. With respect to draft article 52, several members emphasized the decisive role of the rules of the organization in determining whether an organization could resort to countermeasures against its members or be the target of countermeasures by them. It was suggested that disputes between an international organization and its members should, as far as possible, be settled in accordance with the rules and through the internal procedures of the organization. It was also emphasized that the existence and proper functioning of an international organization must not be jeopardized by unilateral countermeasures adopted by its members. As regards countermeasures taken by an injured organization, doubts were raised as to whether the concept of implied powers would constitute a sufficient basis for the right of an international organization to resort to countermeasures.

156. Some members expressed support for the reference to the rules of the organization contained in paragraphs 4 and 5 of draft article 52. However, it was suggested that draft article 52, paragraph 4, should be redrafted in order to clarify that a member of an international organization which considered itself injured by the organization could not, as a general rule, resort to countermeasures except if this conformed with the character and the rules of the organization; the same formulation should be included, *mutatis mutandis*, in paragraph 5.

According to another proposal, the words "not inconsistent with" should be replaced by the word "allowed". It was also suggested that a paragraph 1 *bis* be added, limiting the power of an injured organization to resort to countermeasures to those situations in which such a power was enshrined in its constitutive instrument or in its internal rules. In the event that the rules of the organization were silent on countermeasures, a proposal was made to enunciate, in draft article 52, paragraphs 4 and 5, the prohibition of countermeasures that would significantly prejudice the position of the targeted organization, or threaten its functioning or existence.

157. According to another view, draft article 52 should be substantially reconsidered with a view to limiting countermeasures by international organizations to cases where competences have been transferred to an international organization and the organization resorts to countermeasures in the exercise of such competences.

158. While some members agreed with the Special Rapporteur that the internal rules of an international organization were only relevant to the relations between that organization and its members, other members of the Commission were of the view that respect by an international organization of its internal rules while taking countermeasures could also be claimed by non-members. In particular, it was proposed that draft article 52 enunciate that the targeted State or international organization, whether or not a member of the international organization resorting to countermeasures, should be able to contest the legality of such measures if the functions of that organization did not allow it to adopt countermeasures or if the organ that resorted to such measures acted *ultra vires*.

Draft article 53 Obligations not affected by countermeasures

159. With respect to paragraph 2 (*b*) of draft article 53, the question was raised whether this provision corresponded to the *lex lata* or to the *lex ferenda*, and whether it applied to all international organizations.

Draft article 55 Conditions relating to resort to countermeasures

160. With respect to subparagraph 3 (*b*) of draft article 55, it was proposed that the scope of this exception be extended to situations in which a dispute was pending before a body other than a court or a tribunal, provided that such body had the power to make decisions binding

on the parties. This would also cover mechanisms possibly available within an international organization for the settlement of disputes between the organization and its members.

Draft article 57 Measures taken by an entity other than an injured State or international organization

161. With respect to draft article 57, it was stated that the two paragraphs dealt with questions that were too different in nature to be included in the same provision. Some members expressed support for draft article 57, paragraph 1, dealing with lawful measures that a non-injured State or international organization could take against a responsible international organization. It was suggested that the draft article include the requirement, enunciated in draft article 51, paragraph 3, that the organization invoking responsibility has been given the function to protect the interest of the international community underlying the obligation in question. However, it was also stated that replicating article 54 on State responsibility was not the only option for the Commission; in particular, the question was raised whether the Commission could go a step further and replace the expression "lawful measures" by "countermeasures".

162. Some members supported draft article 57, paragraph 2, dealing with countermeasures taken against a responsible international organization by a regional economic integration organization at the request of an injured member that had transferred to that organization exclusive competence over certain matters. However, according to some members, there was no valid reason to restrict the scope of this provision to regional economic integration organizations, and a suggestion was made that the scope of this provision be expanded so as to cover all cases in which member States had transferred to an international organization competence to act on their behalf. Other members expressed concern about this provision, indicating, in particular, that it would entail a serious risk of abuse and would produce the effect of bringing in more States than those initially injured by an internationally wrongful act. It was proposed that the draft article limit the right of an international organization to adopt countermeasures to those situations where such a right was expressly allowed by the mandate of the organization. It was also proposed that the right of an organization to adopt countermeasures in accordance with paragraph 2 of draft article 57 be limited to those measures that would have been lawfully possible for the member, had it taken those measures itself. If no consensual formulation of this paragraph could be found, a proposal was made either to delete it or to replace it by a "without prejudice" clause concerning regional economic integration organizations.

3. Concluding remarks of the Special Rapporteur

163. The Special Rapporteur observed that the Commission was divided as to whether the draft articles should include a chapter on countermeasures and, in the affirmative, as to what extent international organizations should be considered entitled to resort to countermeasures. A Working Group may attempt to reach a consensus on these issues. If only a "without prejudice" clause was adopted, there would be no opportunity to state, as the current wording of draft article 52, paragraphs 4 and 5 implies, that as a general rule countermeasures had no place in the relations between an international organization and its members. Such a statement, the aim of which was to curb countermeasures, was generally not spelled out in practice or in the literature.

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

164. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INTRODUCTION

Article 1[573]

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

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[573] For the commentary to this article, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 34-37.

Article 2[574]

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3[575]

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.

CHAPTER II[576]

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 4[577]

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.[578]

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[574] For the commentary, see *ibid.*, pp. 38-45.

[575] For the commentary, see *ibid.*, pp. 45-49.

[576] For the commentary to this chapter, see *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 100-103.

[577] For the commentary to this article, see *ibid.*, pp. 104-109.

[578] The location of paragraph 2 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[579]

Article 5[580]

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 6[581]

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 7[582]

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

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[579] The location of paragraph 4 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[580] For the commentary to this article, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 110-115.

[581] For the commentary, see *ibid.*, pp. 116-120.

[582] For the commentary, see *ibid.*, pp. 120-122.

CHAPTER III[583]

BREACH OF AN INTERNATIONAL OBLIGATION

Article 8[584]

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9[585]

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10[586]

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

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[583] For the commentary to this chapter, see *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 86-87.

[584] For the commentary to this article, see *ibid.*, pp. 87-90.

[585] For the commentary, see *ibid.*, p. 91.

[586] For the commentary, see *ibid.*, p. 92.

Article 11[587]

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV[588]

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 12[589]

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 13[590]

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

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[587] For the commentary, see *ibid.*

[588] For the commentary to this chapter, see *ibid.*, pp. 92-96.

[589] For the commentary to this article, see *ibid.*, pp. 96-97.

[590] For the commentary, see *ibid.*, pp. 97-99.

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 14[591]

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

Article 15 [16][592]

Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) That State or international organization commits the act in question in reliance on that authorization or recommendation.

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[591] For the commentary, see *ibid.*, pp. 99-100.

[592] For the commentary, see *ibid.*, pp. 101-105. The square bracket refers to the corresponding article in the third report of the Special Rapporteur (A/CN.4/553).

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Article 16 [15][593]

Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V[594]

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 17[595]

Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 18[596]

Self-defence

The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the principles of international law embodied in the Charter of the United Nations.

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[593] For the commentary, see *ibid.*, p. 105.

[594] For the commentary to this chapter, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 263-264.

[595] For the commentary to this article, see *ibid.*, pp. 264-265.

[596] For the commentary, see *ibid.*, pp. 265-267.

Article 19[597]

Countermeasures

...*[598]

Article 20[599]

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

Article 21[600]

Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

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[597] For the commentary, see *ibid.*, p. 268.

[598] Draft article 19 concerns countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State as circumstances precluding wrongfulness. The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization will be examined in the context of the implementation of the responsibility of an international organization.

[599] For the commentary to this article, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 268-270.

[600] For the commentary, see *ibid.*, pp. 270-272.

Article 22[601]

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(*a*) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The organization has contributed to the situation of necessity.

Article 23[602]

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 24[603]

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

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[601] For the commentary, see *ibid.*, pp. 272-275.

[602] For the commentary, see *ibid.*, pp. 275-276.

[603] For the commentary, see *ibid.*, pp. 276-277.

CHAPTER (X)[604]

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

Article 25[605]

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 26[606]

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 27[607]

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

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[604] The location of this chapter will be determined at a later stage. For the commentary to this chapter, see *ibid.*, pp. 277-279.

[605] For the commentary to this article, see *ibid.*, pp. 279-280.

[606] For the commentary, see *ibid.*, pp. 280-281.

[607] For the commentary, see *ibid.*, p. 282.

Article 28[608]

International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 29[609]

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) It has accepted responsibility for that act; or

(*b*) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 30[610]

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

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[608] For the commentary, see *ibid.*, pp. 283-286.

[609] For the commentary, see *ibid.*, pp. 286-291.

[610] For the commentary, see *ibid.*, pp. 291-292.

PART TWO[611]

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 31[612]

Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 32[613]

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 33[614]

Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

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[611] For the commentary to this Part, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 200.

[612] For the commentary, see *ibid.*, p. 200.

[613] For the commentary, see *ibid.*, pp. 201-202.

[614] For the commentary, see *ibid.*, pp. 202-203.

Article 34[615]

Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 35[616]

Irrelevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

Article 36[617]

Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

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[615] For the commentary, see *ibid.*, pp. 203-204.

[616] For the commentary, see *ibid.*, pp. 205-206.

[617] For the commentary, see *ibid.*, pp. 206-207.

CHAPTER II

REPARATION FOR INJURY

Article 37[618]

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 38[619]

Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 39[620]

Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

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[618] For the commentary, see *ibid.*, p. 208.

[619] For the commentary, see *ibid.*, p. 209.

[620] For the commentary, see *ibid.*, pp. 209-211.

Article 40[621]

Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 41[622]

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 42[623]

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 43[624] [625]

Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.

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[621] For the commentary, see *ibid.*, pp. 211-213.

[622] For the commentary, see *ibid.*, p. 213.

[623] For the commentary, see *ibid.*, pp. 213-214.

[624] For the commentary, see *ibid.*, pp. 214-217.

[625] The following text was proposed, discussed and supported by some members: "The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter."

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 44 [43][626]

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 45 [44][627]

Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

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[626] For the commentary, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 217. The square bracket refers to the corresponding article in the fifth report of the Special Rapporteur (A/CN.4/583).

[627] For the commentary, see *ibid.*, pp. 218-220.

PART THREE[628]

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 46[629]

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) That State or the former international organization individually;

(*b*) A group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State or that international organization; or

(ii) Is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 47[630]

Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(*a*) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of Part Two.

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[628] For the commentary, see section C.2. below.

[629] For the commentary, see section C.2. below.

[630] For the commentary, see section C.2. below.

Article 48[631]

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy provided by that organization has not been exhausted.

Article 49 [48][632]

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(*a*) The injured State or international organization has validly waived the claim;

(*b*) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 50 [49][633]

Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 51 [50][634]

Plurality of responsible States or international organizations

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

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[631] For the commentary, see section C.2. below.

[632] For the commentary, see section C.2. below. The square bracket refers to the corresponding article in the sixth report of the Special Rapporteur (A/CN.4/597).

[633] For the commentary, see section C.2. below.

[634] For the commentary, see section C.2. below.

2. Subsidiary responsibility, as in the case of draft article 29, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(*a*) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(*b*) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 52 [51][635]

Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization that is not an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 33; and

(*b*) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

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[635] For the commentary, see section C.2. below.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 47, 48, paragraph 2 and 49 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 53[636]

Scope of this Part

This Part is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

2. Text of the draft articles with commentaries thereto adopted by the Commission at its sixtieth session

165. The text of draft articles together with commentaries thereto provisionally adopted by the Commission at its sixtieth session is reproduced below.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

(1) Part Three of the present draft articles concerns the implementation of the international responsibility of international organizations. This Part is subdivided into two chapters, according to the general pattern of the articles on responsibility of States for internationally wrongful acts.[637] Chapter I deals with the invocation of international responsibility and with certain associated issues. These do not include questions relating to remedies that may be available for implementing international responsibility. Chapter II considers countermeasures taken in order to induce the responsible international organization to cease the unlawful conduct and to provide reparation.

(2) Issues relating to the implementation of international responsibility are here considered insofar as they concern invocation of the responsibility of an international organization. Thus, while the present articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.

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[636] For the commentary, see section C.2. below.

[637] *Yearbook ... 2001*, vol. II (Part Two), pp. 26-30.

However, one provision (art. 51) refers to the case in which the responsibility of one or more States concurs with that of one or more international organizations for the same wrongful act.

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 46

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) That State or the former international organization individually;

(*b*) A group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

- (i) Specially affects that State or that international organization; or
- (ii) Is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) The present article defines when a State or an international organization is entitled to invoke responsibility as an injured State or international organization. This implies the entitlement to claim from the responsible international organization compliance with the obligations that are set out in Part Two.

(2) Subparagraph (a) considers the more frequent case of responsibility arising for an international organization: that of a breach of an obligation owed to a State or another international organization individually. This subparagraph corresponds to article 42 (a) on responsibility of States for internationally wrongful acts.[638] It seems clear that the conditions for a State to invoke responsibility as an injured State cannot vary according to the fact that the

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[638] *Ibid.*, p. 29.

responsible entity is another State or an international organization. Similarly, when an international organization owes an obligation to another international organization individually, the latter organization has to be regarded as entitled to invoke responsibility as an injured organization in case of breach.

(3) Practice concerning the entitlement of an international organization to invoke international responsibility because of the breach of an obligation owed to that organization individually mainly concerns breaches of obligations that are committed by States. Since the current articles do not address questions relating to the invocation of responsibility of States, this practice is here relevant only indirectly. The obligations breached to which practice refers were imposed either by a treaty or by general international law. It was in the latter context that in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* the International Court of Justice stated that it was "established that the Organization has capacity to bring claims on the international plane".[639] Also in the context of breaches of obligations under general international law that were committed by a State the Governing Council of the United Nations Compensation Commission envisaged compensation "with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait".[640] On this basis, several entities that were expressly defined as international organizations were, as a result of their claims, awarded compensation by the panel of commissioners: the Arab Planning Institute, the Inter-Arab Investment Guarantee Corporation, the Gulf Arab States Educational Research Center, the Arab Fund for Economic and Social Development, the Joint Program Production Institution for the Arab Gulf Countries and the Arab Towns Organization.[641]

(4) According to article 42 (b) on responsibility of States for internationally wrongful acts, a State may invoke responsibility as an injured State also when the obligation breached is owed to a group of States or to the international community as a whole, and the breach of the obligation (i) specially affects that State, or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with regard to the further performance of the

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[639] *I.C.J. Reports 1949*, pp. 184-185.

[640] S/AC.26/1991/7/Rev.1, para. 34.

[641] "Report and Recommendations made by the Panel of Commissioners concerning the Sixth Instalment of 'F1' Claims", S/AC.26/2002/6, paras. 213-371.

obligation.[642] The related commentary gives as an example for the first category a coastal State that is particularly affected by the breach of an obligation concerning pollution of the high seas;[643] for the second category, the party to a disarmament treaty or "any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others".[644]

(5) Breaches of this type, which rarely affect States, are even less likely to be relevant for international organizations. However, one cannot rule out that an international organization may commit a breach that falls into one or the other category and that a State or an international organization may then be entitled to invoke responsibility as an injured State or international organization. It is therefore preferable to include in the present article the possibility that a State or an international organization may invoke responsibility of an international organization as an injured State or international organization under similar circumstances. This is provided in subparagraph (b) (i) and (ii).

(6) While the chapeau of the present article refers to "the responsibility of another international organization", this is due to the fact that the text cumulatively considers invocation of responsibility by a State or an international organization. The reference to "another" international organization is not intended to exclude the case that a State is injured and only one international organization - the responsible organization - is involved. Nor does the reference to "a State" and to "an international organization" in the same chapeau imply that more than one State or international organization may not be injured by the same internationally wrongful act.

(7) Similarly, the reference in subparagraph (b) to "a group of States or international organizations" does not necessarily imply that the group should comprise both States and international organizations or that there should be a plurality of States or international organizations. Thus, the text is intended to include the following cases: that the obligation breached is owed by the responsible international organization to a group of States; that it is owed to a group of other organizations; that it is owed to a group comprising both States and organizations, but not necessarily a plurality of either.

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[642] *Yearbook ... 2001*, vol. II (Part Two), p. 29.

[643] *Ibid.*, p. 119, para. 12.

[644] *Ibid.*, p. 119, para. 13.

Article 47

Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(*a*) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) This article corresponds to article 43 on responsibility of States for internationally wrongful acts.[645] With regard to notice of claim for invoking international responsibility of an international organization, there would be little reason for envisaging different modalities from those that are applicable when an injured State invokes the responsibility of another State. Moreover, the same rule should apply whether the entity invoking responsibility is a State or an international organization.

(2) Paragraph 1 does not determine which form the invocation of responsibility should take. The fact that, according to paragraph 2, the State or international organization invoking responsibility may specify some elements, and in particular "what form reparation should take", does not imply that the responsible international organization is bound to conform to those specifications.

(3) While paragraph 1 refers to the responsible international organization as "another international organization", this does not mean that, when the entity invoking responsibility is a State, more than one international organization needs to be involved.

(4) Although the present article refers to "an injured State or international organization", according to article 52, paragraph 5, the same rule applies to notice of claim when a State or an international organization is entitled to invoke responsibility without being an injured State or international organization within the definition of article 46.

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[645] *Ibid.*, p. 29.

Article 48

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy provided by that organization has not been exhausted.

Commentary

(1) This article corresponds to article 44 on responsibility of States for internationally wrongful acts.[646] It concerns the admissibility of certain categories of claims that States or international organizations may prefer when invoking the international responsibility of an international organization. Paragraph 1 considers those claims that are subject to the rule on nationality of claims, while paragraph 2 relates to the claims to which the local remedies rule applies.

(2) Nationality of claims is a requirement applying to States exercising diplomatic protection. Although article 1 of the draft on diplomatic protection defines that institution with regard to the invocation by a State of the responsibility of another State "for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State", this definition is made "for the purposes of the [...] draft articles".[647] The reference only to the relations between States is understandable in view of the fact that generally diplomatic protection is relevant in that context.[648] However, diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.

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[646] *Ibid.*, p. 29.

[647] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 16.

[648] It was also in the context of a dispute between two States that the International Court of Justice found in its judgment on the preliminary objections in the *Ahmadou Sadio Diallo* case that the definition provided in article 1 on diplomatic protection reflected "customary international law"; *I.C.J. Reports 2007*, para. 39 (also available at http://www.icj-cij.org/docket/files/103/13856.pdf).

(3) The requirement that a person be a national for diplomatic protection to be admissible is already implied in the definition quoted in the previous paragraph. It is expressed in article 3, paragraph 1, on diplomatic protection in the following terms: "The State entitled to exercise diplomatic protection is the State of nationality".[649]

(4) Paragraph 1 of the present article only concerns the exercise of diplomatic protection by a State. When an international organization prefers a claim against another international organization no requirement concerning nationality applies. With regard to the invocation of the responsibility of a State by an international organization, the International Court of Justice stated in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that "the question of nationality is not pertinent to the admissibility of the claim".[650]

(5) Paragraph 2 relates to the local remedies rule. Under international law, this rule does not apply only to claims concerning diplomatic protection, but also to claims relating to the respect of human rights.[651] While the local remedies rule does not apply in the case of functional protection,[652] when an international organization acts in order to protect one of its agents in relation to the performance of his or her mission, an organization may include in its claim also "the damage suffered by the victim or by persons entitled through him", as the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.[653] To that extent the requirement that local remedies be exhausted may be considered to apply.

(6) With regard to a responsible international organization, the need to exhaust local remedies depends on the circumstances of the claim. Provided that the requirement applies in certain cases, there is no need to define here more precisely when the local remedies rule would be

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[649] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 17.

[650] *I.C.J. Reports 1949*, p. 186.

[651] See especially A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983), pp. 46-56; C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 64-75; R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Torino: Giappichelli, 2004). These authors focus on the exhaustion of local remedies with regard to claims based on human rights treaties.

[652] This point was stressed by J. Verhoeven, "Protection diplomatique, épuisement des voies de recours et juridictions européennes", *Droit du pouvoir, pouvoir du droit - Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), p. 1511, at p. 1517.

[653] *I.C.J. Reports 1949*, p. 184.

applicable. One clear case appears to be that of a claim in respect of the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked with regard to remedies existing within the European Union. One instance of practice is provided by a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim of the United States was inadmissible because remedies relating to the controversial EC regulation had not been exhausted, since the measure was at the time "subject to challenge before the national courts of EU Member States and the European Court of Justice".[654] This practice suggests that whether a claim is addressed to the EU member States, or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.

(7) The need to exhaust local remedies with regard to claims towards an international organization has been accepted, at least in principle, by the majority of writers.[655] Although the

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[654] "Oral statement and comments on the US response", 15 November 2000, A/CN.4/545, attachment No. 18.

[655] The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), p. 427, at pp. 454-455; P. De Visscher, "Observations sur le fondement et la mise en oeuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé*, vol. 40 (1963), p. 165, at p. 174; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (The Hague: Nijhoff, 1968), p. 238; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried out by the U.N.", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57, at p. 67; L. Gramlich, "Diplomatic Protection Against Acts of Intergovernmental Organs", *German Yearbook of International Law*, vol. 27 (1984), p. 386, at p. 398 (more tentatively); H.G. Schermers & N.M. Blokker, *International Institutional Law*, 3rd ed. (The Hague: Nijhoff, 1995), pp. 1167-1168; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 534 ff.; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 250; K. Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002), pp. 66-67. The same opinion was expressed by the International Law Association in its final report on "Accountability of International Organisations", *Report of the Seventy-First Conference (Berlin)*, 2004, p. 213. C. Eagleton, "International Organizations and the Law of Responsibility", *Recueil des cours …*, vol. 76 (1950-I), p. 323, at p. 395 considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because "the United Nations does not have a judicial system or other means of 'local redress' such as are regularly maintained by states". A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de droit international et de sciences diplomatiques*, vol. 57 (1979), p. 81, at p. 108 noted that "when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law may still develop in different directions". The view that the local remedies rule should be applied in a flexible manner was expressed by M. Perez González, "Les organisations internationales et le

term "local remedies" may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2.

(8) As in article 44 on responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of "any available and effective remedy". This requirement has been elaborated in greater detail by the Commission in articles 14 and 15 on diplomatic protection,[656] but for the purpose of the present articles the more concise description may prove adequate.

(9) While the existence of available and effective remedies within an international organization may be the prerogative of only a limited number of organizations, paragraph 2, by referring to remedies "provided by that organization", intends to include also remedies that are available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims. The location of the remedies may affect their effectiveness in relation to the individual concerned.

(10) As in other provisions, the reference to "another" international organization in paragraph 2 is not intended to exclude that responsibility may be invoked towards an international organization even when no other international organization is involved.

(11) Paragraph 2 is also relevant when, according to article 52, responsibility is invoked by a State or an international organization other than an injured State or international organization. A reference to article 48, paragraph 2, is made in article 52, paragraph 5, to this effect.

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droit de la responsabilité", *Revue générale de droit international public*, vol. 92 (1988), p. 63, at p. 71.

C.F. Amerasinghe, *Principles of the International Law of International Organisations*, 2nd ed. (Cambridge: Cambridge University Press, 2003), p. 486, considered that, since international organizations "do not have jurisdictional powers over individuals in general", it is "questionable whether they provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable"; this view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), pp. 139-140.

[656] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 20.

Article 49 [48]

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(*a*) The injured State or international organization has validly waived the claim;

(*b*) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) The present article closely follows the text of article 45 on responsibility of States for internationally wrongful acts,[657] with replacement of "a State" with "an international organization" in the chapeau and the addition of "or international organization" in subparagraphs (a) and (b).

(2) It is clear that, for an injured State, the loss of the right to invoke responsibility can hardly depend on whether the responsible entity is a State or an international organization. In principle also an international organization should be considered to be in the position of waiving a claim or acquiescing in the lapse of the claim. However, it is to be noted that the special features of international organizations make it generally difficult to identify which organ is competent to waive a claim on behalf of the organization and to assess whether acquiescence on the part of the organization has taken place. Moreover, acquiescence on the part of an international organization may involve a longer period than the one normally sufficient for States.

(3) Subparagraphs (a) and (b) specify that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is "validly" made. As was stated in the commentary on article 17, this term "refers to matters 'addressed by international law rules outside the framework of State responsibility', such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor".[658] In the case of an international organization validity implies that the rules of the organization have to be respected.

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[657] *Yearbook ... 2001*, vol. II (Part Two), p. 29.

[658] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 265.

However, this requirement may encounter limits such as those stated in article 46, paragraphs 2 and 3, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[659] with regard to the relevance of respecting the rules of the organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules.

(4) When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.

(5) Although subparagraphs (a) and (b) refer to "the injured State or international organization", a loss of the right to invoke responsibility because of a waiver or acquiescence may occur also for a State or an international organization that is entitled, in accordance with article 52, to invoke responsibility not as an injured State or international organization. This is made clear by the reference to article 49 contained in article 52, paragraph 5.

Article 50 [49]

Plurality of injured States or international organizations

> Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Commentary

(1) This provision corresponds to article 46 on responsibility of States for internationally wrongful acts.[660] The following cases, all relating to responsibility for a single wrongful act, are here considered: that there is a plurality of injured States; that there exists a plurality of injured international organizations; that there are one or more injured States and one or more injured international organizations.

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[659] A/CONF.129/15.

[660] *Yearbook ... 2001*, vol. II (Part Two), p. 29.

(2) Any injured State or international organization is entitled to invoke responsibility independently from any other injured State or international organization. This does not preclude some or all of the injured entities invoking responsibility jointly, if they so wish. Coordination of claims would contribute to avoid the risk of a double recovery.

(3) An instance of claims that may be concurrently preferred by an injured State and an injured international organization was envisaged by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The Court found that both the United Nations and the national State of the victim could claim "in respect of the damage caused […] to the victim or to persons entitled through him" and noted that there was "no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense […]".[661]

(4) An injured State or international organization could engage itself to refrain from invoking responsibility, leaving other injured States or international organizations to do so. If this engagement is not only an internal matter between the injured entities, it could lead to the loss for the former State or international organization of the right to invoke responsibility according to article 49.

(5) When an international organization and one or more of its members are both injured as the result of the same wrongful act, the internal rules of an international organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

Article 51 [50]

Plurality of responsible States or international organizations

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

2. Subsidiary responsibility, as in the case of draft article 29, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

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[661] *I.C.J. Reports 1949*, pp. 184-186.

3. Paragraphs 1 and 2:

(*a*) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(*b*) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Commentary

(1) The present article considers the case that an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States. The joint responsibility of an international organization with one or more States is envisaged in articles 12 to 15, which consider the responsibility of an international organization in connection with the act of a State, and in articles 25 to 29, which concern the responsibility of a State in connection with the act of an international organization. Another example is provided by so-called mixed agreements that are concluded by the European Community together with its member States, when such agreements provide for joint responsibility. As was stated by the European Court of Justice in a case *Parliament v. Council* relating to a mixed cooperation agreement: "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance".[662]

(2) Like article 47 on responsibility of States for internationally wrongful acts,[663] paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. However, there may be cases in which a State or an international organization bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization fails to do so. Article 29, paragraph 2, to which paragraph 2 of the present article

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[662] Judgment of 2 March 1994, case C-316/91, *European Court Reports* (1994), p. I-623, at pp. I-660-661, recital 29.

[663] *Yearbook ... 2001*, vol. II (Part Two), p. 29.

refers, gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is "presumed to be subsidiary".

(3) Whether responsibility is primary or subsidiary, an injured State or international organization is not required to refrain from addressing a claim to a responsible entity until another entity whose responsibility has been invoked has failed to provide reparation. Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim.

(4) Paragraph 3 corresponds to article 47, paragraph 2, on responsibility of States for internationally wrongful acts, with the addition of the words "or international organization" in subparagraphs (a) and (b). A slight change in the wording of subparagraph (b) intends to make it clearer that the right of recourse accrues to the State or international organization "providing reparation".

Article 52 [51]

Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization that is not an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 33; and (*b*) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 47, 48, paragraph 2, and 49 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Commentary

(1) The present article corresponds to article 48 on responsibility of States for internationally wrongful acts.[664] It concerns the invocation of responsibility of an international organization by a State or another international organization which, although it is owed the obligation breached, cannot be regarded as injured within the meaning of article 46 of the current draft. According to paragraph 4, when that State or the latter international organization is entitled to invoke responsibility, it may only claim cessation of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation: the latter "in the interest of the injured State or international organization or of the beneficiaries of the obligation breached".

(2) Paragraph 1 concerns the first category of cases in which this limited entitlement arises. The category comprises cases when the "obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group". Apart from the addition of the words "or international organizations" and "or organization", this text reproduces subparagraph (a) of article 48, paragraph 1, on State responsibility.

(3) The reference in paragraph 1 to the "collective interest of the group" is intended to specify that the obligation breached is not only owed, under the specific circumstances in which the breach occurs, to one or more members of the group individually. For instance, should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach, although not specially so. Each member of the group would then be entitled to request compliance as a guardian of the collective interest of the group.

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[664] *Ibid.*, pp. 29-30.

(4) Obligations that an international organization may have towards its members under its internal rules do not necessarily fall within this category. Moreover, the internal rules may restrict the entitlement of a member to invoke responsibility of the international organization.

(5) The wording of paragraph 1 does not imply that the obligation breached should necessarily be owed to a group comprising States and international organizations. That obligation may also be owed to either a group of States or a group of international organizations. As in other provisions, the reference to "another international organization" in the same paragraph does not imply that more than one international organization needs to be involved.

(6) Paragraphs 2 and 3 consider the other category of cases when a State or an international organization that is not injured within the meaning of article 46 may nevertheless invoke responsibility, although to the limited extent provided in paragraph 4. Paragraph 2, which refers to the invocation of responsibility by a State, is identical to article 48, paragraph 1, subparagraph (b) on responsibility of States for internationally wrongful acts. It seems clear that, should a State be regarded as entitled to invoke the responsibility of another State which has breached an obligation towards the international community as a whole, the same applies with regard to the responsibility of an international organization that has committed a similar breach. As was observed by the Organization for the Prohibition of Chemical Weapons, "there does not appear to be any reason why States - as distinct from other international organizations - may not also be able to invoke the responsibility of an international organization".[665]

(7) While no doubts have been expressed within the Commission with regard to the entitlement of a State to invoke responsibility in the case of a breach of an international obligation towards the international community as a whole, some members expressed concern about considering that also international organizations, including regional organizations, would be so entitled. However, regional organizations would then act only in the exercise of functions that have been attributed to them by their member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.

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[665] A/CN.4/593, sub F.1.

(8) Legal writings concerning the entitlement of international organizations to invoke responsibility in case of a breach of an obligation towards the international community as a whole, mainly focus on the European Union. The views are divided among authors, but a clear majority favours an affirmative solution.[666] Although authors generally consider only the invocation by an international organization of the international responsibility of a State, a similar solution would seem to apply to the case of a breach by another international organization.

(9) Practice in this regard is not very indicative. This is not just because practice relates to action taken by international organizations in respect of States. When international organizations respond to breaches committed by their members they often act only on the basis of their respective rules. It would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility. The most significant practice appears to be that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole. For instance, a common position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".[667] It is not altogether clear whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization. In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next Chapter.

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[666] The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales - une réponse à J. Verhoeven", *Revue belge de droit international*, vol. 18 (1984-5), p. 96, at pp. 104-105; E. Klein, "Sanctions by International Organizations and Economic Communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101, at p. 110; A. Davì, *Comunità europee e sanzioni economiche internazionali* (Napoli: Jovene, 1993), p. 496 ff.; C. Tomuschat, "Artikel 210", in: H. van der Groeben, J. Thiesing, C.D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th edition (Baden-Baden: Nomos, 1997), vol. 5, pp. 28-29; P. Klein, *La responsabilité ..., op. cit.*, p. 401 ff.; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales* (Valencia: Tirant, 2006), p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Revue belge de droit international*, vol. 18 (1984-5), p. 79, at pp. 89-90, and P. Sturma, "La participation de la Communauté internationale à des 'sanctions' internationales", *Revue du marché commun et de l'Union européenne*, No. 366 (1993), p. 250, at p. 258. According to P. Palchetti, "Reactions by the European Union to Breaches of Erga Omnes Obligations", in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 219, at p. 226, "the role of the Community appears to be only that of implementing rights that are owed to its Member States".

[667] *Official Journal of the European Communities*, 14 May 2000 *L* 122, p. 1.

(10) Paragraph 3 restricts the entitlement of an international organization to invoke responsibility in case of a breach of an international obligation owed to the international community as a whole. It is required that "safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility". Those functions reflect the character and purposes of the organization. The rules of the organization would determine which are the functions of the international organization. There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.

(11) The solution adopted in paragraph 3 corresponds to the view expressed by several States[668] in the Sixth Committee of the General Assembly, in response to a question raised by the Commission in its 2007 report to the General Assembly.[669] A similar view was shared by some international organizations that expressed comments on this question.[670]

(12) Paragraph 5 is based on article 48, paragraph 3, on responsibility of States for internationally wrongful acts. It is designed to indicate that the provisions concerning notice of claim, admissibility of claims and loss of the right to invoke responsibility apply also with regard to States and international organizations that invoke responsibility according to the present article. While article 48, paragraph 3, on State responsibility makes a general reference to the corresponding provisions (arts. 43 to 45), it is not intended to extend the applicability of "any

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[668] Thus the interventions of Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 100), Italy (A/C.6/62/SR.19, para. 40), the Netherlands (A/C.6/62/SR.20, para. 39), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (A/C.6/62/SR.21, para. 85). Other States appear to favour a more general entitlement for international organizations. See the interventions of Belgium (A/C.6/62/SR.21, para. 90), Cyprus (A/C.6/62/SR.21, para. 38), Hungary (A/C.6/62/SR.21, para. 16) and Malaysia (A/C.6/62/SR.19, para. 75).

[669] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, section D, para. 30. The question ran as follows: "Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?"

[670] See the views expressed by the Organization for the Prohibition of Chemical Weapons (A/CN.4/593, sub F.1), the Commission of the European Union (*ibid.*), the World Health Organization (*ibid.*) and the International Organization for Migration (A/CN.4/593/Add.1, sub B). See also the reply of the World Trade Organization (A/CN.4/593, sub F.1).

applicable rule relating to the nationality of claims", which is stated in article 44, subparagraph (a), because that requirement is clearly extraneous to the obligations considered in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies.

Article 53

Scope of this Part

This Part is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Commentary

(1) Articles 46 to 52 above consider implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 36, which defines the scope of the international obligations set out in Part Two by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole. The same article further specifies that this is "without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization". Thus, by referring only to the invocation of responsibility by a State or an international organization the scope of the present Part reflects that of Part Two. Invocation of responsibility is considered to the extent that it concerns only the obligations set out in Part Two.

(2) While it could be taken as implied that the articles concerning invocation of responsibility are without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke responsibility of an international organization, an express statement to this effect serves the purpose of conveying more clearly that the present Part is not intended to exclude any such entitlement.

CHAPTER VIII

EXPULSION OF ALIENS

A. Introduction

166. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[671] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

167. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).[672]

168. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573) and a study prepared by the Secretariat (A/CN.4/565). The Commission decided to consider the second report at its next session, in 2007.[673]

169. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,[674] and draft articles 3 to 7.[675]

B. Consideration of the topic at the present session

170. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/594), which it considered at its 2969th, 2972nd and 2973rd meetings, on 30 May and 5 and 6 June 2008. At its 2973rd meeting, the Commission decided to establish

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[671] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic of "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid., Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of and approach to the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion in the long-term programme of work.

[672] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 242-275.

[673] *Ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[674] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401 and 402.

[675] *Ibid.*, footnotes 396 to 400.

a working group under the chairmanship of Mr. Donald M. McRae: in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.

171. At the end of its meeting on 14 July 2008, the Working Group concluded that the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities. The Group also agreed to include in the commentary wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals. The Chairman of the Working Group presented the Group's conclusions to the Commission at the latter's 2984th meeting on 24 July 2008. The Commission approved those conclusions and requested the Drafting Committee to take them into consideration in its work.

172. At its 2989th meeting, on 4 August 2008, the Commission received an oral progress report by the Chairman of the Drafting Committee. The draft articles referred to the Drafting Committee remain in the Committee until work on all draft articles is completed.

1. Introduction by the Special Rapporteur of his fourth report

173. During the Commission's consideration of the third report of the Special Rapporteur, it had been observed that the issue of the expulsion of persons having two or more nationalities should be studied in more detail and resolved either within draft article 4, which set out the principle of non-expulsion of nationals, or in a separate draft article. It had also been observed that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study.

174. With regard to the legal situation of persons having dual or multiple nationality, the Special Rapporteur had stated, in his third report, that it was not desirable to deal with the issue in connection with draft article 4, since the rule prohibiting the expulsion of nationals applied to any State of which a person was a national. The issue could, however, have an impact in the context of the exercise of diplomatic protection in cases of unlawful expulsion.

175. The fourth report, prepared in response to questions raised by a number of members, contained two parts. The first examined the problem of the expulsion of persons having dual or multiple nationality, while the second dealt with the loss of nationality and denationalization in relation to expulsion.

176. With regard to the expulsion of persons having two or more nationalities, the fourth report dealt principally with two issues. The first issue was whether the principle of non-expulsion of nationals was applicable in a strict manner to a person with dual or multiple nationality possessing the nationality of the expelling State. The second was whether a State would be in violation of its international obligations if it expelled an individual with dual or multiple nationality possessing the nationality of the expelling State, without first withdrawing its own nationality from that individual.

177. On the first point, it was noted that some States did sometimes treat their nationals who also held another nationality as aliens for purposes other than expulsion. Such an attitude was not, however, sufficient in itself to serve as a legal basis for expulsion, insofar as the persons concerned could claim the nationality of the expelling State in order to contest the legality of the expulsion.

178. On the second point, the rule prohibiting the expulsion by a State of its own nationals, as proposed by the Special Rapporteur in his third report, tended to support the idea that such an expulsion would be contrary to international law. In practice, however, the expulsion of persons having dual or multiple nationality without prior denationalization was not unusual.

179. According to an absolute understanding of the prohibition of the expulsion of nationals, it is sometimes argued that the expulsion of a person having dual or multiple nationality, including the nationality of the expelling State, must always be preceded by denationalization. In the view of the Special Rapporteur, however, requiring the expelling State to denationalize persons having dual or multiple nationality prior to expulsion was not the best solution, since denationalization could undermine any right of return of the person concerned.

180. In the light of the analysis contained in his fourth report, the Special Rapporteur was of the view that: (a) the principle of the non-expulsion of nationals did not apply to persons with dual

or multiple nationality unless the expulsion could lead to statelessness; and that (b) the practice of some States and the interests of expelled persons themselves did not support the enactment of a rule prescribing denationalization of a person with dual or multiple nationality prior to expulsion.

181. The legal problems raised by the expulsion of a person with dual or multiple nationality could be still more complex, depending on whether or not the expelling State was the State of dominant or effective nationality of the person concerned. The Special Rapporteur continued to doubt the practical interest and utility of entering into such considerations at the present stage. The various scenarios could more appropriately be addressed in the framework of a study on the protection of the property rights of expelled persons, which the Special Rapporteur planned to undertake at a later stage.

182. The question of whether there was any possibility of derogation from the rule prohibiting the expulsion of nationals also remained open. Putting to one side a number of historical examples, such as the expulsion of dethroned monarchs, modern situations could be envisaged in which a State might, exceptionally, have the right to expel one of its nationals, provided that another State agreed to take that person and that the person retained the right to return to his or her own country at the request of the receiving State. For example, it might be admissible for a State that was the victim of espionage activities by one of its nationals to expel that person to the State for the benefit of which the activities in question had been conducted, if that other State was willing to receive the person concerned. The question was therefore whether the Commission wished to lay down an absolute prohibition against the expulsion of nationals or whether it was prepared to consider derogations in exceptional circumstances.

183. The second part of the fourth report related specifically to the problem of loss of nationality and denationalization in relation to expulsion. Even though loss of nationality and denationalization had similar consequences from the point of view of the legal situation of the person being expelled, the fact was that the loss of nationality was the consequence of an individual's voluntary act, whereas denationalization was a State decision of a collective or individual nature.

184. The Special Rapporteur was not convinced that it would be worthwhile for the Commission to prepare, even in the interests of the progressive development of international law, draft articles on the issues dealt with in his fourth report. Such issues pertained more to the nationality regime than the topic of expulsion of aliens.

2. Summary of the debate

(a) General comments

185. It was noted that all States, in exercising their sovereign right to grant or withdraw nationality, were bound to respect international law, including certain basic human rights rules set out in a variety of universal and regional international instruments. Some members considered that the Commission should reaffirm the right of everybody to a nationality and the right not to be arbitrarily deprived of one's nationality. It was said that the Special Rapporteur had not attached sufficient importance in his fourth report to developments in the field of human rights.

186. It was said that nationality should be seen as an individual's right and not simply as an instrument of State policy. It was also emphasized that there could be no difference between an individual's first nationality and other nationalities acquired subsequently. The prohibition against the expulsion of persons having dual or multiple nationality or against denationalization could not be restricted solely to cases in which statelessness might result; in which there was no State that was obliged to receive the expelled person; or in which the rules on the prohibition of arbitrary action and the principle of non-discrimination would be breached.

187. Some members shared the Special Rapporteur's conclusion that there should not be draft articles dealing specifically with the questions covered in his fourth report. Some, however, shared the Special Rapporteur's conclusion without supporting the analysis on which it was based.

188. Other members considered that the Commission should proceed to the preparation of draft articles on the expulsion of persons with dual or multiple nationality and on denationalization as a preliminary to expulsion. It was necessary, they felt, to lay down certain minimum rules in

order to avoid arbitrary action and abuse. It was also suggested that consideration might be given to alternative solutions, such as draft guidelines or recommendations that could be included in an annex to the draft articles, if that could be of any practical use.

189. It was suggested that the Special Rapporteur had allowed himself to be overly influenced by the practice of some States, in the fight against terrorism, for example, and that he had sometimes based his analysis on historical examples or on situations other than cases of expulsion.

190. Several members were of the view that a working group should be established to consider the questions dealt with in the Special Rapporteur's fourth report.

(b) The situation of persons having dual or multiple nationality in relation to expulsion

191. Some members were of the view that the Commission could not ignore the question of dual or multiple nationality, which was a phenomenon increasingly common in the modern age. It was noted that it was not possible to establish a rule prohibiting the expulsion of nationals without answering the question of whether the rule also applied to persons having dual or multiple nationality. Regardless of whether or not a provision would be included in the draft articles on the non-expulsion of nationals, it was necessary to determine whether a State could consider a person having dual or multiple nationality as an alien for the purposes of expulsion.

192. Contrary to the view maintained by the Special Rapporteur, a number of members believed that, with regard to expulsion, international law did not allow a State to consider its nationals having one or several other nationalities as aliens. Some members emphasized that the prohibition against the expulsion of nationals, which was recognized in a number of universal and regional human rights instruments, equally applied to persons having dual or multiple nationality, including the nationality of the expelling State. Reference was made to the European Convention on Nationality of 6 November 1997, article 17 (1) of which stated that: "nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party". The particular situation of women having dual or multiple nationality was also mentioned.

193. In the view of some members, the elements of practice cited by the Special Rapporteur to make a distinction between persons having only one nationality on the one hand and, on the other hand, those having dual or multiple nationality were not conclusive with respect to the question of expulsion. Such was the case with agreements on consular protection of persons having dual nationality and with certain restrictions on the political rights of persons having dual nationality, in particular eligibility for certain government functions. In addition, some members mentioned national legislation which prohibited the expulsion of persons having dual or multiple nationality in the same way as persons having only the nationality of the expelling State.

194. Another view point was that a failure to make any distinction, for the purposes of expulsion, between persons having a single nationality, dual nationality or multiple nationality led to a situation where differing legal and factual realities were treated as being the same.

195. It was said that it was not necessary to devote a draft article to the situation of persons having dual or multiple nationality in the context of expulsion, as those persons were covered by the rule prohibiting the expulsion of nationals. Another view was that it was important to specify that the prohibition against the expulsion of nationals included persons having dual or multiple nationality. It was also proposed that a draft article should be prepared stating that persons having dual or multiple nationality had the same rights as those holding only the nationality of the expelling State.

196. Some members shared the view of the Special Rapporteur that the notion of dominant or effective nationality could play a role in the context of the expulsion of persons having dual or multiple nationality. Other members, however, stressed that the prohibition against expelling a national was applicable regardless of whether or not the dominant or effective nationality of the person subject to expulsion was that of the expelling State. In other words, the criterion of dominant or effective nationality, which was relevant in the context of diplomatic protection or the field of private international law for the purposes of the settlement of conflicts of nationality or conflicts of laws, could not justify a State treating its nationals having one or several other nationalities as aliens for the purposes of expulsion.

197. Lastly, it was observed that the existence of a receiving State, for example one of the States of nationality of the person expelled, was not a decisive factor in determining the legality of an expulsion.

(c) Loss of nationality, denationalization and expulsion

198. Some members considered that the expulsion of a person having dual or multiple nationality, including the nationality of the expelling State was not permissible if the person concerned had not been previously denationalized. The opposite approach would be to recommend that States should treat persons having dual or multiple nationality as aliens. The fact that expulsions of persons having dual or multiple nationality without prior denationalization were not unusual in practice did not suffice to make such expulsions legitimate. Other members were of the view that denationalization could never be used for the purposes of expulsion, while some others were of the view that denationalization was absolutely prohibited under international law.

199. It was observed that the distinction between loss of nationality and denationalization was not evident, insofar as the former could also be regarded as an automatic form of denationalization.

200. Some members pointed out that, under international law, a State could make provision in its legislation for loss of nationality by a person who acquired the nationality of another State. It was also pointed out that States had the right to punish the abuse or fraudulent use of dual or multiple nationality.

201. The observation was made that once an alien was defined as a person who did not have the nationality of the expelling State the question arose as to whether the right of a State to expel aliens included the right to expel a person who had become an alien by virtue of denationalization.

202. The point was stressed that denationalization had often been abused to violate the rights of certain persons, wrongfully deprive them of their property and then expel them. It was also said

that denationalization occurred most often in non-democratic societies as political punishment or in special circumstances, for example, during succession of States or armed conflict. Mention was made of some national legislation prohibiting denationalization in any circumstance.

203. Some members were of the view that denationalization was only allowed in exceptional circumstances; that it must not lead to statelessness; that it must be neither discriminatory nor arbitrary; and that it must respect certain procedural guarantees. It was suggested that the Commission should identify the minimum conditions that must be met with respect to denationalization, taking account of the fundamental principles of international law and human rights principles.

204. It was proposed that a draft article should be prepared prohibiting denationalization where it would render a person stateless.

205. Some members were of the view that denationalization of a person with a view to facilitating his or her expulsion was contrary to international law. If the expulsion of nationals was prohibited, it necessarily followed that a State could not circumvent that prohibition by denationalizing one of its nationals with a view to his or her expulsion. It was suggested that the commentary should clarify that point. Other members proposed that a draft article should be prepared explicitly prohibiting denationalization for the purposes of expulsion.

206. Several members downplayed the relevance of the partial award rendered by the Eritrea-Ethiopia Claims Commission,[676] to which the Special Rapporteur had referred in his fourth report. Since the award had been handed down in a very particular case, involving a situation of State succession and armed conflict, it was not possible to infer from it general rules on denationalization followed by expulsion, especially as the Claims Commission had reached different conclusions on the various individual cases of expulsion of which it had been seized. It was further remarked that the individuals in question had been considered less as dual nationals than as nationals of an enemy State posing a threat to the security of the expelling State.

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[676] Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 17 Dec. 2004, ILM vol. 44, p. 601.

3. Concluding remarks of the Special Rapporteur

207. The Special Rapporteur stated that he was not ready to embark on a study of the issues pertaining to the regime of nationality. Having listened to the members who had taken part in the discussion, moreover, he had yet to be convinced of the advisability of preparing draft articles on the issues dealt with in his fourth report.

208. The Special Rapporteur had suggested that a draft article should be devoted to the principle of non-expulsion of nationals, in order to reiterate a rule that seemed to be well-established. On that point, he would await instructions from the Commission as to whether the rule prohibiting the expulsion of nationals must be an absolute rule or whether exceptions could be contemplated.

209. Contrary to the view expressed by some members, the notion of dominant or effective nationality to which the Special Rapporteur had referred in his fourth report was a well-established notion that was recognized in several contexts, in particular in case-law and doctrine.

210. In the Special Rapporteur's view, a rule prohibiting the expulsion of persons having dual or multiple nationality who were nationals of the expelling State did not exist as such in international law. If, however, the Commission decided to extend to those categories of persons the rule prohibiting the expulsion of nationals, the current draft article 4 would suffice, without the issue of dominant or effective nationality needing to be addressed.

211. According to the Special Rapporteur, a draft article stating that it was prohibited to denationalize a person who would be rendered stateless by virtue of denationalization did not seem necessary, since the prohibition was well-established in international law.

212. Neither international treaty law nor international customary law contained a rule prohibiting a State from denationalizing a person with a view to his or her expulsion. The practice in several States tended to be quite the opposite; generally speaking, the purpose of denationalization was to expel the persons concerned. At most, the commentary on draft article 4

could state that, to the extent possible, States should not denationalize a person with a view to his or her expulsion and, if they did so, they must respect their national legislation and any particular criteria which might be set out in the commentary.

213. The Special Rapporteur had been somewhat surprised by the discussion on the relevance of the partial award by the Eritrea-Ethiopia Claims Commission to which he had referred in his fourth report. While it was possible to criticize the award, it was not acceptable to downplay its significance to the point of denying that it had any relevance to the subject in hand. The real issue was whether the arguments and conclusions of the Claims Commission had a sufficient basis in international law.

CHAPTER IX

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

214. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.[677] At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.[678]

B. Consideration of the topic at the present session

215. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area, presenting in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

216. The Commission considered the preliminary report from its 2978th to 2982nd meetings, on 15 to 18 and 22 July 2008, respectively.

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[677] At its 2929th meeting, on 1 June 2007, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375. The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the Commission's decision to include the topic "Protection of persons in the event of disasters" in its programme of work. The topic was included in the Long-term programme of work of the Commission, during its fifty-eighth session (2006), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 261, on the basis of a proposal by the Secretariat, *ibid.*, annex C. See also paragraph 7 of General Assembly resolution 61/34 of 4 December 2006, which took note of the inclusion of the topic in the long-term programme of work.

[678] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

1. Introduction by the Special Rapporteur of his preliminary report

217. In his introduction of the report, the Special Rapporteur underlined its preliminary character, and the importance of reading it together with the comprehensive memorandum by the Secretariat. The report was intended to flesh out certain basic assumptions that could inform and stimulate the debate in the Commission, in particular on the scope of the topic and how the topic should be approached.

218. In connection with the general scope of the topic, the Special Rapporteur recalled that although the title of the topic was broad, no official records existed to throw any light as to the reasons why the Commission decided to stress aspects concerning "protection of persons" rather than "relief" or "assistance", the basic aspect emphasized in the original proposal by the Secretariat in the Working Group on the Long-term programme of work. In his view, the "protection of persons" had connotations of a broader concept. Moreover, the focus on the individual as a victim of a disaster implied that certain rights accrued to that individual, suggesting the need for a rights-based approach which would inform the operational mechanisms of protection. Although the concept of protection did not entail that persons affected by disasters as such constituted a separate legal category, victims of such disasters were confronted with a distinct factual situation with specific needs that required addressing. In addition to the victims, there would also be a need to take into account a multiplicity of actors involved in disaster situations.

219. The Special Rapporteur also noted that the concept of disaster, which was not a legal term, and how it was classified bear on the scope of the topic. In the appreciation of the term, it was important to understand that it was not simply the occurrence of the disaster as such that was the point of material concern but the whole range of aspects involved: cause,[679] duration[680] and context.[681] Accordingly, a number of consequences ensued from taking a broad approach to protection.

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[679] According to cause, disasters were generally divided into two categories: natural disasters (e.g., earthquakes, tsunamis and volcanic eruptions) and man-made disasters (e.g., oil spills, nuclear accidents and armed conflict).

[680] In terms of duration, disasters may have sudden onset (e.g., hurricanes) or slow onset (creeping) (e.g., droughts, food shortages and crop failures).

[681] Contextually, disasters may occur in a single or complex emergency. Within the United Nations, a complex emergency was generally defined as a humanitarian crisis in a country, region or society in which there is total or

220. First, it would imply the consideration of all disasters, whether natural or man-made. Secondly, it would mean the consideration of the issues revolving around the various phases of a disaster, namely the pre-, in- and post-disaster phases, which corresponded to, although not necessarily coextensive with, concepts of prevention and mitigation; response; and rehabilitation.[682] In the view of the Special Rapporteur it was important to take a holistic approach. In fashioning rules for the protection of persons in a process of codification and progressive development, the need for protection was equally compelling in all situations, taking into account their complexity. Moreover, it was not always easy to maintain distinctions between different causes and contexts or as regards duration. However, the Special Rapporteur readily accepted that such a holistic approach would not encompass armed conflict *per se* within the scope of the topic.

221. Thirdly, there would be need to consider the concept of protection, in particular whether it should be seen as distinct from response, relief and assistance or as encompassing all of them. In his view, the concept was all encompassing as to cover specific aspects of response, relief and assistance. Although protection would *lato sensu* be all encompassing, *stricto sensu*, with a rights-based approach, there would be a certain specificity to rights ensuing therefrom that would have to be elaborated. The difference between protection *lato sensu* and protection *stricto sensu* was hermeneutical, with the latter focusing on the rights involved.

222. Fourthly, the broad approach involved the need to have appreciation of the tensions underlying the relationship between protection and the principles of sovereignty and non-intervention, as well as an understanding of the conceptual framework underpinning protection. From the standpoint of the victims of disasters, the existence of a right to humanitarian assistance would require particular focus. On the one hand, the International Court of Justice in the *Nicaragua* case had said that "[t]here can be no doubt that the provision of

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considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country programme.

[682] The concept of response restricted itself temporally to the disaster phase. Relief was a broader concept which, like assistance, encompassed the pre-disaster stage as well as the stage beyond immediate response. Assistance was intended to denote the availability and distribution of the goods, materials and services essential to the survival of the population. Rehabilitation activities were properly linked to the response phase which addresses the immediate needs of individuals affected by a disaster. Rehabilitation deals with post-recovery activities but should be distinguished from development activities, which can be described in terms of support to and implementation of autonomous development policies.

strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law".[683] Yet on the other hand, there was a tension in practice with the traditional approach to principles of sovereignty and non-intervention. Moreover, there was need to give careful attention to the relationship between the topic and emerging notions, such as the responsibility to protect, which, in respect of disasters, suggested a responsibility to prevent, respond and assist and rehabilitate. The Special Rapporteur underscored that the appropriateness of extending the concept of responsibility to protect and its relevance to the present topic required careful reflection; even if it were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications were unclear.[684]

223. As regards the sources of the law that the Commission needed to consider in order to elaborate basic standards of treatment applicable to the victim under the topic, the Special Rapporteur noted that the protection of persons was not new in international law. There was a particular relationship between the concept of protection of persons affected by disasters and the rights and obligations attached thereto and the regimes, which bear on protection, in international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. Such regimes, based on a basic premise of protecting the human person under any circumstances, and underscoring the essential universality of humanitarian principles, would be complementary. Moreover, in developing the necessary framework for the topic, it would be useful to consider such principles as humanity, impartiality, neutrality and non-discrimination, as well as the principles of sovereignty and non-intervention.

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[683] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, at para. 242. The Court went on to say: "The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

> 'The Red Cross born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours - in its international and national capacity - to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples'

and that

> 'It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.'"

[684] In particular, it was not clear the extent to which the responsibility created rights for third parties, the content of such rights, how they would be triggered or whether it was individual or collective.

224. The existing and recent focus on the development of rules had been on the operational aspects, as exemplified by the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.[685] There was a distinct corpus of law relating to international disaster response and relief which was applicable. Although there was no universal comprehensive instrument, a number of multilateral treaties existed, including at the regional and subregional levels. Also relevant was national legislation. There was also a significant number of bilateral treaties dealing with cooperation and assistance. In addition, this corpus of law was informed by a considerable amount of soft law instruments applicable to humanitarian assistance activities in the event of disasters, notably decisions of organs of the United Nations and other international organizations, as well as non-governmental organizations.

225. The Special Rapporteur noted that the Commission was confronted with a challenging task of contemporary relevance, as recent disasters have shown, and it will have the opportunity to consider the sources available while also remaining steadfast to its mandate under the Statute, namely the codification and progressive development of international law on the subject. The work was innovative in character and it would be important to recognize that the final draft would have to be as pragmatic as possible to respond to real needs. In addition to State actors, such work would require consultations with international organizations, non-governmental organizations and commercial entities.

2. Summary of the debate

226. Members of the Commission welcomed the fact that the preliminary report had identified the core and complex issues that would require to be addressed in the discussion of the scope of the topic, thus also allaying concerns that may have existed as to the usefulness of the Commission taking up the topic. Recent tsunamis, hurricanes, cyclones, earthquakes, and flash floods in various parts of the world vividly demonstrated the timeliness of the consideration of the subject and the magnitude of the problems to be addressed. Members were also appreciative of the memorandum of the Secretariat.

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[685] Adopted at the 30th International Red Cross and Red Crescent Conference, 26-30 November 2007.

(a) A rights-based approach to the topic

227. Several members agreed with a rights-based approach in the consideration of the topic as suggested by the Special Rapporteur. It was noted that such an approach was important since it attached paramount value to human needs, with the attendant consequences that gave rise to obligations and responsibilities of society towards individuals. Such an approach, solidly grounded in positive law, would draw upon, in particular, international humanitarian law, international human rights law, international refugee law and the law relating to internally displaced persons, without necessarily replicating such law.

228. Nevertheless, in the view of some members, a general understanding of what was meant by a rights-based approach for the purposes of the topic was considered necessary. According to one perspective, a human rights approach should not only be perceived from the angle of according the protection of the individual but also take into account community interests, in particular of the vulnerable groups, while bearing in mind the obligations and limitations of States affected by disaster. Since human rights law allowed certain derogations in times of emergency, analogies could be drawn as to what rights and duties would apply in disaster situations. Moreover, a rights-based approach was not exclusive of rights of victims to humanitarian assistance; there was need to be respectful of the rights of the affected States, in particular their sovereignty and, consistent with the principle of subsidiarity, their primary role in the initiation, organization, coordination and implementation of humanitarian assistance which should not be taken unilaterally. It was emphasized that a rights-based approach should not be seen as incompatible with or contradicting principles of sovereignty and non-intervention.

229. Some members, viewing a rights-based approach as one that would focus on the human rights of the victim, observed that it may not always be the case that such an approach would prove to be beneficial. Stressing the contemporary nature and high visibility of the topic, together with the attendant high expectations, it was necessary for the Commission to assess carefully whether in fact a rights-based approach would be the most propitious approach for meeting such expectations. In this connection, it was essential to determine what consequences would flow from a rights-based approach, in particular whether such an approach would also require addressing questions on how such rights would be enforced. Thus, although the rights of persons affected by disasters were an important part of the background to the topic, it was

contended that the real focus ought to be on the obligations that would be taken to facilitate action to protect such persons. Such obligations could implicate many actors, including the affected State, States offering assistance as well as international and non-governmental organizations.

(b) Scope of the topic

230. Some members concurred in the suggestion by the Special Rapporteur that a broad approach be pursued in the consideration of the topic. In this regard, it was confirmed that the topic as conceived by the Commission was intended to broadly focus on individuals in a variety of disaster situations. For some other members, a broad approach was without prejudice; it would be easier, at a later stage, to narrow the scope from a broader perspective than to broaden it from a narrower perspective. Moreover, it did not exclude the possibility of taking a step-by-step approach in the elaboration of the topic, commencing with natural disasters.

Scope ratione materiae

231. Some members highlighted the need to define "protection" for the purposes of this topic. Such an exercise should seek to determine the rights and obligations of the different actors in a disaster situation. It could also deal with rights and duties of the international community as a whole, thus helping to elucidate the content of obligations *erga omnes*. It was highlighted that a range of human rights was relevant in a disaster situation, including the right to life, the right to food, the right to the supply of water, the right to adequate shelter or housing, clothing and sanitation and the right not to be discriminated against. Reference was also made to article 11 of the Convention on the Rights of Persons with Disabilities, by the terms of which States have a duty to ensure protection and safety of persons with disabilities in several situations, including disasters.[686] While recognizing the role played by non-State actors in providing assistance, the point was made that their obligations should not be reflected in the language of the responsibility to protect. Some members emphasized the necessity to underline the primary role of the affected State as a general principle and the contributory and subsidiary role of other actors as part of an

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[686] "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."

overarching umbrella of international cooperation and solidarity. It was similarly important to elaborate on the content of a right of initiative insofar as it related to activities of such actors in disaster situations.

232. Commenting on a possible definition of a disaster since there was none generally agreed in international law, the view was expressed that the definition of hazard in the Hyogo Framework of Action[687] was a useful starting point, but one which required precision beyond simply adopting a holistic approach. Some other members, however, considered it too wide. Instead, it was suggested that the definition under the Tampere Convention provided a good basis for future work.[688]

233. Some members noted that it was important that the scope not be limited to only natural disasters; human suffering was not partial to the origin of the disaster. The goal underpinning protection applied to all disasters irrespective of their cause. Indeed, increasingly there was a recognition in scientific circles that human activity contributes to natural disasters, including, for example, deforestation being a contributory factor to flooding. Moreover, in many situations disasters involved complex emergencies, and it was not always easy to determine whether the cause was natural or man-made.

234. It was nevertheless pointed out by some other members that the primary focus should be on natural disasters; man-made disasters should be included only if they met a certain threshold, for instance if they had effects of a natural disaster; while others viewed any possible threshold to be unworkable. Furthermore, politically, natural disasters seemed to be less sensitive than man-made disasters and in many instances man-made disasters, such as nuclear and industrial accidents or oil spills, were already subject of international regulation.

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[687] Hyogo Framework for Action 2005-2015, see report of the World Conference on Disaster Reduction, held in Kobe, Japan, from 18 to 22 January 2005 (A/CONF.206/6 and Corr.1), resolution 2:

> "A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)."

[688] Article 1, paragraph 6 of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations: "Disaster" means a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.

235. On another view, the distinction between natural or man-made disasters did not resolve all the definitional problems. The key consideration was to determine whether the nature of the needs in such a wide range of circumstances could be subsumed under the notion of disaster and whether a meaningful regime could be developed to cover all the needs.

236. For some members, as evident from the title of the topic, environmental protection was not directly part of the protection regime. Moreover, it was already well regulated. However, some other members favoured the possibility of covering the environment and property within the scope of the topic insofar as there was a link with protection of persons, for example, if the disaster in question affected or threatened to affect the life, dignity and elementary basic needs of human beings. On another view, to the extent that environmental disasters would be covered as part of the broad approach covering both natural and man-made disasters, environmental or property damage should not be excluded *a priori*.

237. Several members agreed to exclude armed conflict from the scope of the topic. Such exclusion would be justified precisely because there was a well defined regime that governed such conflicts, as *lex specialis*. Moreover, it was exigent to exercise caution to ensure that international humanitarian law is not undermined. Some other members on the other hand observed that the exclusion itself should be examined further. In some instances, in complex emergencies for example, a natural disaster situation was exacerbated by a continuing armed conflict. Moreover, issues concerning assistance in the law relating to internal armed conflict were not as robustly regulated as in the law relating to international armed conflict; a rule gap may need further exploration in the context of disasters.

Scope ratione personae

238. In addition to individuals as victims, it was necessary to address the status, rights and obligations of the providers of relief and assistance, including other States, international organizations and non-governmental organizations. It was also suggested that there was need to explore further whether the notion of protection of "persons" should include both natural and legal persons.

Scope ratione temporis

239. Some members agreed with the Special Rapporteur on the need to address the various phases of a disaster and consider, as appropriate, questions concerning prevention, assistance and rehabilitation. It was nevertheless pointed out that there was need to be cautious in order not to overly extend the scope; indeed in certain instances different rights and obligations would ensue for different phases and these needed to be identified for each phase; some rights may be more relevant in one phase than in other phases. This would require the identification of the areas of law that needed development and which would create specific implementable obligations by States, on the basis of each phase. In this connection, some other members expressed preference for a focus, at least for the time being, on response and assistance in the immediate aftermath of a disaster, alongside prevention during the pre-disaster phase. Also relevant for consideration was whether natural disasters which had sudden onset had characteristics that would require different treatment from disasters with a slow onset.

Scope ratione loci

240. For some members, the nature of the topic was such that it would be immaterial whether a disaster has occurred within one State or has transboundary effects. It was nevertheless pointed out that it may be useful to explore whether there were problems which were peculiar to disasters affecting a single State or multiple States that could require a differentiated focus.

(c) Right to humanitarian assistance

241. Several members concurred in the proposition that humanitarian relief efforts were predicated on the principles of humanity, impartiality and neutrality. Equally relevant were the principle of non-discrimination, the principle of solidarity, as well as international cooperation. Moreover, sovereignty and territorial integrity were guiding principles in the coordination of humanitarian emergency assistance. Some members contended that sovereignty entailed duties that a State owed to its inhabitants, including of protection. The principles of sovereignty and non-intervention were no excuse to act in a manner that denied victims access to assistance. However, to the extent that sovereignty or non-intervention entailed both negative and positive obligations, it would be necessary, although the issues implicated by the subject were

controversial, for the Commission to address the context, in particular situations in which a State is recalcitrant and refuses assistance amidst continuing human suffering or oppresses its own people.

242. In relation specifically to the right to humanitarian assistance, some members doubted its existence when viewed as implying the right to impose assistance on a State that did not want it and urged the Special Rapporteur to proceed on the assumption that there was no such right. Such a right would be in conflict with principles of sovereignty and non-intervention, be contrary to the need for consent of the affected States, as stipulated in relevant General Assembly resolutions, including resolution 46/182, annex,[689] and was unsupported by State practice. Cogent policy considerations also militated in favour of rejecting such a right: it could be easily abused and give rise to double standards.

243. It was nevertheless pointed out by some other members that instead of considering the right to humanitarian assistance as "a right to impose assistance", it was more appropriate to envisage it as a "right to provide assistance"; such an approach would be in line with the reasoning of the International Court of Justice in the *Nicaragua* case. The point was also made that if an affected State cannot discharge its obligation to provide timely relief to its people in distress it must have an obligation to seek outside assistance.

244. Some members noted that the right to humanitarian assistance was viewed as an individual right, typically exercised collectively, which should be recognized as implicit in international humanitarian law and international human rights law. Its non-fulfilment was considered a violation of fundamental rights to life and human dignity.

245. Some other members noted that it was too premature to discuss the content of a right to humanitarian assistance; it could be a subject of detailed analysis by the Special Rapporteur at a later stage.

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[689] Annex, para. 3 "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country."

246. It was also observed that the 2003 resolution on Humanitarian Assistance of the Institute of International Law provided a useful indication of some of the problems to be discussed and their possible solutions.[690]

Relevance of the responsibility to protect

247. While noting that the Special Rapporteur seemed to be tentative in underpinning the topic on the basis of the responsibility to protect, some members, in view of the broad approach to the topic, pointed to the inevitability of considering the relevance of the responsibility and addressing the various contentious issues. A future report by the Special Rapporteur could touch on this aspect and in this regard other relevant developments in the area were highlighted.[691] Some members also saw a connection between protection and aspects of human security which needed to be explored.

248. Some other members doubted the existence of a responsibility to protect, particularly in the context of disasters. Its emergence as a principle was confined to extreme circumstances, namely situations of persistent and gross violations of human rights and could not be easily transferable to disaster relief without State support. In this regard, it was also recalled that the World Summit Outcome invokes such a responsibility for each State in order to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Any action by the international community would be through the United Nations, acting in accordance with Chapters VI and VII of the Charter.[692] Some members did not see any compelling reason why the responsibility to protect could not be extended to or transposed in situations involving disasters.

249. Some members viewed the responsibility to protect as bearing on humanitarian intervention. The Commission should therefore be cautious in its approach. Some other members

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[690] 2003 Resolution on Humanitarian Assistance of the Institute of International Law, 02.09.2003, Bruges Session - 2003, Sixteenth Commission.

[691] See for example the Report of the High-level Panel on Threats, Challenges and Change (A/59/565), the Report of the Secretary-General, In larger freedom: towards development, security and human rights for all (A/59/2005), the Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, available at: www.iciss-ciise.gc.ca, the 2005 World Summit Outcome (General Assembly resolution 60/1).

[692] The 2005 World Summit Outcome (General Assembly resolution 60/1).

pointed out that the responsibility was still primarily a political and a moral concept the legal parameters of which were yet to be developed and did not change the law relating to the use of force. In the view of other members however the responsibility to protect existed as a legal obligation without necessarily extending to the use of force.

250. Some other members stressed that the topic could be elaborated independently, without any consideration of whether or not there was a responsibility to protect.

(d) Sources relevant to the consideration of the topic

251. It was recognized that the Commission's exercise was likely to be based more on *lex ferenda* than *lex lata*. Accordingly, it was essential to proceed deliberatively in the process of systematization. There were certain legal rights and duties which may be accepted as such in a legal instrument emerging from the Commission. At the same time, there were also moral rights and duties to be recommended *de lege ferenda*. For some, while the practice of non-State actors may be relevant in identifying best practices, it could not count as practice relevant in the formation of custom or the interpretation of treaty law.

252. Some members stressed the need for the Commission to be faithful to its mandate and concentrate on the legal aspects of the matter, focusing on the *lex lata*, and where appropriate bearing in mind the *lex ferenda*.

253. It was also suggested that the emphasis could be on practical problem solving, concentrating on areas where there was a rule deficit, taking into account lessons learned in previous disasters. Such an approach would have an advantage of limiting the current broad scope of the topic and enable the Commission to contribute effectively to the legal framework relating to disasters. In this connection, there was a further need to better identify the areas that warranted adoption of a set of articles or guidelines on the topic, focusing on the problems that confronted persons in the event of disaster. At the same time, it was pointed out that it was important not to duplicate work already done elsewhere, for example, in the guidelines adopted by the International Red Cross and Red Crescent Conference at its 30th Conference.[693]

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[693] See footnote 685 above and text.

254. While agreeing with the relevance of international humanitarian law, human rights law, refugee law and the law relating to internally displaced persons (IDPs) in the consideration of the topic, some members noted that other fields of law, such as the international law relating to immunities and privileges, customs law and transportation law were also germane. A further suggestion was to avoid reproducing such rules in detail.

255. It was also pointed out that customary international law was not so peripheral in its relevance to the topic; it incorporated certain general principles, such as sovereignty and non-intervention, the principle of cooperation and the Martens Clause, which were of great importance to the topic.

256. It was so suggested that the Commission should not only aim at normatively elaborating a series of rules of conduct for the actors concerned, but should also consider institutional aspects, such as the establishment of a specialized agency to coordinate responses to and assistance in large-scale disasters. It was also noted in this respect that the role played by the United Nations, and non-governmental organizations, as well as problems encountered in the field needed to be assessed and analysed.

(e) Future programme of work and final form

257. Some members, concurring with the Special Rapporteur, noted that it would be desirable to decide on the form relatively at an early stage in the consideration of the topic. It was also pointed out that the fact that the Commission's work would largely be in the area of progressive development than codification, the pragmatic goal of the project would be to lay down a framework of legal rules, guidelines or mechanisms which will facilitate practical international cooperation in disaster response. In this regard, some members expressed a general preference for a framework convention setting out general principles, and which could form a point of reference in the elaboration of special or regional agreements. Some other members favoured non-binding guidelines, perceiving them as a more realistic outcome.

258. Some members noted that it was premature to take a decision on the final form; such a decision could be deferred until a later stage. Meanwhile, draft articles, as is customary in the working methods of the Commission, should be presented for consideration.

259. A suggestion was made also for the Special Rapporteur to provide a provisional plan of the future work to be discussed in a working group, alongside other issues relevant to the topic. The establishment of such a working group was considered premature by some other members. In order to have a better appreciation of the problems, it was also suggested that at an appropriate time it would be worthwhile to invite experts in the field within the United Nations system and the NGO community for a dialogue.

3. Concluding remarks of the Special Rapporteur

260. The Special Rapporteur expressed his appreciation for the comments made on his preliminary report. He was more than convinced that the Commission would steer the topic towards a successful conclusion, notwithstanding its complexity and the challenges ahead. The detailed observations made will help the Special Rapporteur in the preparation of future reports. The completion of the project would definitely require consultations and contacts with key actors, including the United Nations and the International Federation of the Red Cross and Red Crescent.

261. In charting out the future course of action, the Special Rapporteur welcomed the general support given to taking a broad approach in the consideration of the topic. At the same time, he recognized that it was feasible to proceed by focusing initially on natural disasters, without losing sight of other types of disasters. In this regard, he recalled that the Commission, in the 2006 syllabus, already anticipated this approach when it was proposed that the more immediate need was to consider the activities undertaken in the context of natural disasters, without prejudice to the possible consideration of the international principles and rules governing actions undertaken in the context of other types of disasters.[694] Indeed, the request by the Commission in 2007 to the Secretariat was to prepare a study initially limited to natural disasters.[695]

262. While acknowledging that the concept of protection is wide enough to encompass the three phases of a disaster, the Special Rapporteur also pointed out, at least initially, the focus should be on response, without necessarily excluding the study at a later stage of prevention and mitigation on the one hand and rehabilitation on the other.

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[694] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), annex C, paras. 1 and 2.

[695] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

263. He emphasized that a codification effort that takes into account the rights of the victims had a stronger foundation in law. It gave rise to justiciable rights, with correlative rights and duties on other actors, against the backdrop of the principles of sovereignty, non-intervention and cooperation; principles which have been reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970). The affected State not only has a primary responsibility to provide assistance to affected people but also its consent was essential in the provision of humanitarian assistance.

264. The Special Rapporteur also noted that it would be the task of the Commission to elaborate draft articles without prejudice to the final form. The objective, as noted in the 2006 syllabus, would be to elaborate a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities, clarifying the core legal principles and concepts thereby creating a legal "space" in which such a disaster relief work could take place on a secure footing. The text could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.[696] The final form would be a convention or a declaration incorporating a model or guidelines. In this connection, the Special Rapporteur drew attention to the relevance of the Framework Convention on Civil Defence Assistance, done at Geneva on 22 May 2000.

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[696] *Ibid., Sixty-first Session, Supplement No. 10* (A/61/10), annex C, paras. 24.

CHAPTER X

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

265. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[697] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[698]

B. Consideration of the topic at the present session

266. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/601), as well as a memorandum of the Secretariat on the topic (A/CN.4/596). The Commission considered the report at its 2982nd to 2987th meetings, from 22 to 25 and 29 to 30 July 2008.

1. Introduction by the Special Rapporteur of his preliminary report

267. The Special Rapporteur indicated that his preliminary report aimed at briefly describing the history of the consideration of this subject by the Commission and the Institute of International Law, as well as at outlining the issues which the Commission should analyse as part of its consideration of this topic and in its possible formulation of any future instrument. He noted that, since the publication of the syllabus that was annexed to the 2006 report of the Commission,[699] attention for the question of immunity of State officials from foreign criminal jurisdiction had not abated: new academic work on the topic had been published and several national and international judicial decisions had been rendered, including the recent Judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in*

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[697] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in Annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[698] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

[699] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Annex A, pp. 436-454.

Criminal Matters (Djibouti v. France).[700] The substantial amount of available information had been considered both in his preliminary report and in the informative Secretariat memorandum, but it was far from being exhausted. The preliminary report, he emphasized, tried to describe objectively the different opinions that had been expressed on the matter and the Special Rapporteur had occasionally given his preliminary views on certain questions.

268. The Special Rapporteur highlighted that the report contained an examination of only some of the questions for further consideration by the Commission and that he intended to cover the remaining preliminary issues in his subsequent report: these issues included the question of the scope of immunity of State officials from foreign criminal jurisdiction and some procedural questions, such as the waiver of immunity.

269. According to the Special Rapporteur, the very title of the topic gave guidance to determining its boundaries. The Commission was to examine only the immunity of State officials from *foreign criminal* jurisdiction, thus leaving aside questions relating to immunity with respect to international criminal tribunals and the domestic courts of the State of nationality of the official, as well as immunity in civil or administrative proceedings before foreign jurisdictions. Furthermore, the topic should focus on immunity under international law, and not under domestic legislation: provisions contained in national laws should only be relevant as evidence of the existence of customary international law.

270. The Special Rapporteur emphasized that the issue of immunity of State officials from foreign criminal jurisdiction arose in inter-State relations. In conformity with the predominant legal literature and case-law (and despite some judicial decisions that had justified immunity by reference to international comity), the Special Rapporteur considered that there was sufficient basis to affirm that the source of immunity of State officials from foreign criminal jurisdiction was not international comity but, first and foremost, international law, particularly customary international law.

271. He further observed that criminal jurisdiction was not to be restricted to its judicial dimension and covered executive actions undertaken long before the actual trial, the issue of immunity being thus often settled by States through diplomatic channels at the pretrial stage.

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[700] Judgment of 4 June 2008 (for the text, see the official website of the Court in http://www.icj-cij.org).

The Special Rapporteur also noted that criminal jurisdiction was not exercised over the State, but that criminal prosecution of a foreign State official may affect the sovereignty and security of that State and constitute interference in its internal matters, especially in the case of senior officials. He did not consider it appropriate to analyse further the issue of jurisdiction *per se*.

272. In the Special Rapporteur's view, the legal norm or principle of immunity implied a right of the State of the official and of the official himself or herself not to be subject to jurisdiction and a corresponding obligation incumbent upon the foreign State. It should be further examined whether the latter obligation encompasses only the negative duty not to exercise jurisdiction or also a positive obligation to take measures to prevent breaches of immunity. Furthermore, the Special Rapporteur considered that immunity was procedural, and not substantive, in nature: while it exempted the individual from executive and judicial jurisdiction, it did not free him or her from prescriptive jurisdiction, i.e. from the obligation to abide by the laws of the foreign State and from his or her criminal responsibility in case of breach of that law. The Special Rapporteur also noted that, already at this stage of the study, he had the impression that the issue under consideration was in fact not that of the immunity from foreign criminal jurisdiction, but rather the immunity from certain legal measures of criminal procedure or from criminal prosecution. However, he added, this issue would only become clearer after the study of the scope of immunity.

273. The Special Rapporteur raised the question whether it was necessary for the Commission to define the notion of "immunity" for the purposes of the present topic. He recalled that the Commission had rejected this idea in its work on the topic of jurisdictional immunities of States and their property. The Special Rapporteur further observed that a distinction is usually drawn between two types of immunity of State officials: immunity *ratione personae* (or personal immunity) and immunity *ratione materiae* (or functional immunity). The distinction appeared to be useful for analytical purposes, although these two types of immunity shared some common characteristics.

274. The Special Rapporteur expressed the view that the immunity of State officials from foreign criminal jurisdiction was explained by a combination of the "functional necessity" and "representative" theories, and that its more fundamental legal and policy rationale was to be

found in the principles of sovereign equality of States and non-interference in internal affairs, as well as in the need to ensure the stability of international relations and the independent performance of State activities.

275. As regards the scope of the topic with respect to the persons covered, the Special Rapporteur observed that the title generically referred to the notion of "State officials". Although, in some instances, reference had been made in this context only to Heads of State, Heads of Government and ministers for foreign affairs, it was widely recognized that all State officials enjoy immunity *ratione materiae*. In practice, States faced the issue of immunity from foreign criminal jurisdiction in respect of different categories of their officials. The Special Rapporteur suggested therefore that the notion of "State officials" be retained and that it could be defined by the Commission for the purposes of this topic. He also pointed out that the Commission should examine the status of both incumbent and former officials.

276. With respect to immunity *ratione personae*, the Special Rapporteur observed that, particularly in light of the judgment of the International Court of Justice in the *Arrest Warrant* case,[701] it was obvious that Heads of State, Heads of Government and ministers for foreign affairs enjoyed this kind of immunity. The question was left open, however, as to whether other high-ranking officials (e.g., ministers of defence, deputy Heads of Government, etc.) would also enjoy personal immunity. This issue could hardly be solved by an enumeration of the relevant official positions and it seemed that the Commission should rather endeavour to identify criteria to establish those officials who enjoy personal immunity.

277. Finally, the Special Rapporteur drew the attention of the Commission to two issues that were found on the margins of the topic, namely that of the role of recognition in the context of immunity and that of the immunity of family members of State officials, and primarily of high-ranking officials. The Special Rapporteur was of the view that the former question arose only in exceptional cases. He was thus doubtful that further consideration should be given to both issues.

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[701] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 51.

2. Summary of the debate

(a) General comments

278. The Special Rapporteur was commended for the thoroughness of his preliminary report, which constituted an excellent basis for a discussion on the topic. Members also expressed their appreciation to the Secretariat for its high-quality and detailed memorandum.

279. There was support to the proposition by the Special Rapporteur that the Commission should not consider, within this topic, the questions of immunity before international criminal tribunals and before the courts of the State of nationality of the official.

280. Some members emphasized that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations had already been codified and need not be addressed in the context of this topic.

(b) Sources

281. Members agreed with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law, and not merely on international comity. It followed that the work of the Commission on the topic could be founded on a solid normative basis and would truly constitute a task of codification of existing rules. In this connection, some members pointed out that the Commission should examine relevant judicial decisions of national tribunals. At the same time, it was noted that the Commission should be cautious in assessing the value of those decisions for the purposes of determining the state of international law on the subject. In the view of some members there was also room for progressive development of international law in this field.

(c) Basic concepts

282. Members commented on the basic concepts examined in the preliminary report. As regards the notion of "jurisdiction", some members agreed with the Special Rapporteur's view that the said notion covers the entire spectrum of procedural actions, and support was expressed for the idea of giving special attention to the pretrial phase. It was also noted that, as explained in

the preliminary report and in conformity with the opinion of the International Court of Justice,[702] jurisdiction logically preceded immunity, in the sense that any question of immunities only arises once the tribunal has established its jurisdiction to hear the case.

283. Some members suggested that the Commission consider the implications for immunity of the principle of universal jurisdiction taking into account the developments in national legislation and national case law and in the light of the developments in the international system, in particular the establishment of the International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction has led to misunderstandings, escalation of inter-State tensions and given rise to perceptions of abuse on political or other grounds.[703]

284. With respect to the notion of "immunity" itself, some members supported the idea that the Commission should attempt to define this notion. It was observed, in this regard, that immunity was procedural in nature and did not absolve the State official from its duty to abide by national law and from his or her criminal responsibility in case of breach. Support was expressed for the Special Rapporteur's analysis that immunity was a legal relationship which implied a right for the State official not to be subjected to foreign criminal jurisdiction and a corresponding obligation incumbent upon the foreign State concerned.

285. Some members were of the view that, contrary to what had been suggested in the preliminary report, the Commission should not refrain from dealing with the question of immunity from interim measures of protection or measures of execution; some other members, however, endorsed the suggestion contained in the report. While some members supported the Special Rapporteur's intention to consider existing practice in relation to immunities of State officials and of the State itself from foreign civil jurisdiction, on account of their common features with the present topic, some other members maintained that those immunities were too different in nature from immunity from criminal jurisdiction for the relevant practice to be relied upon in this context.

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[702] *Arrest Warrant* case, p. 20, para. 46.

[703] See for example, Decision of Assembly of the African Union on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec.199 (XI) of 1 July 2008).

286. Some members expressed support for the view that, in its rationale, immunity had both a functional and a representative component, and that it was justified by the principles of sovereign equality and non-interference in internal affairs, and by the need to ensure stable relations among States. While some members emphasized the emerging role of the functional component of immunity in recent practice, some other members recalled that the representative component continued to be relevant since certain officials were granted immunity because they were considered to embody the State itself.

287. It was generally agreed that a distinction could be drawn between two types of immunity of State officials: immunity *ratione personae* and immunity *ratione materiae*. Some members underlined the importance of these concepts to differentiate the status of high-ranking and other State officials, and that of incumbent and former officials. According to one view, it was preferable to set aside this typology and consider the concepts of "official" and "private" acts and the time dimension of immunity (e.g., with respect to acts carried out before office or by former officials while in charge). It was also pointed out that immunity *ratione materiae* of officials should not be confused with the immunity of the State itself; according to another view, however, all immunities of officials derive from the immunity of the State.

(d) Persons covered

288. With respect to the terminology to be employed to refer to the persons covered by immunity, some members supported the Special Rapporteur's proposal to continue to use, at this stage, the expression "State officials". Some other members suggested, however, that the terms "agents" or "representatives" could be preferred. It was noted that, in any event, the precise persons covered by those terms should be determined. A view was expressed that the scope of persons covered could be narrowed down to those who exercise the specific powers of the State (a criterion which would make it possible to exclude from the scope of the topic certain categories of officials, such as teachers, medical workers, etc.); reference was made in this regard to the notion of "public service" used by the Court of Justice of the European Communities.

289. Support was expressed for the Special Rapporteur's view that all State officials should be covered by the topic, given that they enjoy immunity *ratione materiae*. However, some members were of the opinion that only the question of immunity of Heads of State, Heads of Government

and ministers for foreign affairs should be considered by the Commission. The Special Rapporteur was encouraged to study further the status of former officials, notably in light of the *Pinochet* case[704] and paragraph 61 of the Judgment of the International Court of Justice in the *Arrest Warrant* case.[705]

290. Some members supported the view that Heads of State, Heads of Government and ministers for foreign affairs (the so-called "troika") enjoyed immunity *ratione personae*. It was argued by some members, however, that the International Court of Justice's finding, in the *Arrest Warrant* case, that such immunity was enjoyed by ministers for foreign affairs did not have a firm basis in customary international law as was explained in the dissenting opinions in that case. Some other members, however, pointed to the pre-eminent role of the minister for foreign affairs in the conduct of international relations and his representative character, as justification for treatment of the minister for foreign affairs on the same footing as head of State for purposes of according immunity. The question was also raised in the debates whether personal immunity extended to other categories of high-ranking officials. Some members excluded this possibility, pointing to the particular representative role in international relations of the three categories of officials mentioned above, to the insufficient practice to support any extension of immunity, and to policy considerations. Some other members believed that certain senior officials (which could include, in addition to those mentioned by the Special Rapporteur, vice-presidents, cabinet ministers, heads of parliament, presidents of the highest national courts, heads of component entities of federal States, etc.) were also to be granted such immunity; they called for the Commission to determine criteria, such as the representative nature or the importance of the functions performed, for the identification of those officials. The Judgment of the Court in the *Arrest Warrant* case[706] was invoked in support of the latter argument, although certain members remarked that the Court appeared to have adopted a more restrictive approach in its more recent decision in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[707] Some other members, while acknowledging that other senior officials

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[704] See, in particular, United Kingdom, House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 24 March 1999, reproduced in *International Legal Materials*, vol. 38, 1999, pp. 581-663.

[705] *Arrest Warrant* case, p. 26, para. 61.

[706] *Ibid.*, pp. 21-22, para. 51.

[707] Judgment of 4 June 2008, notably at para. 194.

besides the Head of State, Head of Government and minister for foreign affairs could enjoy immunity *ratione personae*, were of the view that the Commission should limit its examination to the latter three and leave the question open as to whether immunity might also be granted to other officials. It was emphasized that, in any event, no official would continue to enjoy personal immunity after the end of his or her functions. According to a view, certain State officials enjoy immunity *ratione personae* when exercising official functions abroad because they would be considered as being on a special mission.

291. The suggestion was made that the Commission should also analyse the question of immunity of military personnel deployed abroad in times of peace, which was often the subject of multilateral or bilateral agreements, but also raised issues of general international law.

292. On the role of recognition in the context of immunity, a view was expressed that this issue was central to the present topic and should be examined by the Commission. Some members, however, supported the Special Rapporteur's view that the question of recognition was not part of the Commission's mandate on this topic and that, at most, a "without prejudice clause" could be adopted on the matter. It was indicated by some members that, if a State was in existence, immunity should be granted to its officials independently from recognition. The view was also expressed, however, that immunity should not be extended to officials of those self-proclaimed States which had not received the general recognition of the international community. Some members believed that the Commission should examine the consequences of the non-recognition of an entity as a State on the immunity of that entity's officials.

293. Some members considered that the immunity of the family members of State officials was mainly based on international comity and remained outside the scope of the topic. Some other members, however, suggested that this subject should be dealt with by the Commission.

(e) The question of possible exceptions to immunity

294. Some members insisted that the Special Rapporteur, in examining the scope of immunity in his subsequent report, should devote special attention to the central question of whether State officials enjoy immunity in the case of crimes under international law.

295. In this regard, some members expressed the view that there was sufficient basis both in State practice and in the previous work of the Commission (notably in its 1996 draft Code of Crimes against the Peace and Security of Mankind) to affirm that there exists an exception to immunity when a State official is accused of such crimes. It was argued by some members that the fact that immunity was excluded in the statutes and case law of international criminal tribunals could not be ignored when dealing with immunity from foreign criminal jurisdiction. Some members further contended that the position of the International Court of Justice in the *Arrest Warrant* case[708] ran against the general trend towards the condemnation of certain crimes by the international community as a whole (as exemplified by the position of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Blaškić* case[709]), and that the Commission should not hesitate to either depart from that precedent or to pursue the matter as part of progressive development. According to some members, the Commission should further determine whether international law had changed since the said Judgment, notably in light of national legislation passed in the meantime for the implementation of the Rome Statute of the International Criminal Court. Some other members considered that the content and implications of the judgment merited further consideration by the Commission.

296. Some members mentioned several possible explanations of exceptions to immunity, including the non-official character of crimes under international law, the *jus cogens* nature of the norm prohibiting such crimes, or the condemnation of those crimes by the international community as a whole. The Special Rapporteur was called to examine such possible explanations in his subsequent report to determine, in particular, whether such exceptions

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[708] *Arrest Warrant* case, p. 3.

[709] *Prosecutor v. Blaškić* (IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the review of the decision of Trial Chamber II of 18 July 1997, para. 41:

> "... It is well known that customary international law protects the internal organization of each sovereign State ... . The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. Similarly, other classes of persons (for example, spies, as defined in Article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907), although acting as State organs, may be held personally accountable for their wrongdoing."

applied to all, or only some, crimes under international law and whether, and to what extent, it was applicable to immunity *ratione materiae* or also to immunity *ratione personae*. Some members pointed out that these questions put into play a balancing of the interest of stopping impunity for such crimes and that of ensuring freedom of action for States at the international level. It was suggested that consideration be also given to the ways in which such exceptions to immunity could be structured to strengthen international criminal tribunals, taking into account the complementary jurisdiction of the International Criminal Court: for example, it could be envisaged that, while officials from States having accepted the jurisdiction of the Court would have complete immunity from foreign criminal jurisdiction, officials from States that have not done so would not enjoy immunity in the case of crimes under international law.

297. Some other members maintained that there were good reasons for the Commission to hesitate before restricting immunity. In their opinion, the *Arrest Warrant* judgment reflected the current state of international law and the developments after this Judgment in international and national jurisprudence, as well as in national legislation, rather confirmed this state of affairs than called it into question. It could therefore not be said that the *Arrest Warrant* judgment went against a general trend. The absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary. The *Blaškić* judgment of the International Criminal Tribunal for the former Yugoslavia was therefore not pertinent. In the opinion of those members, important legal principles, as well as policy reasons, spoke in favour of maintaining the state of international law, as it is expressed, for example, in the *Arrest Warrant* judgment. According to them, the principles of sovereign equality and of stability of international relations were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules on the use of force.

298. These members maintained that, while the Commission should, as always, consider the possibility of making proposals *de lege ferenda*, it should do so on the basis of a careful and full analysis of the *lex lata* and of the policy reasons which underpin this *lex lata*. It was only on this basis that a balancing of interests between the principles of immunity and the fight against

impunity could be fruitfully undertaken. In the opinion of these members, the *jus cogens* character of certain international norms did not necessarily affect the principle of immunity of State officials before national criminal jurisdictions.

299. Some members emphasized that the Commission should also consider other possible exceptions to the immunity of State officials, namely in the case of official acts carried out in the territory of a foreign State without the authorization of that State, such as sabotage, kidnapping, murder committed by a foreign secret service agent, aerial and maritime intrusion or espionage.

3. Concluding remarks of the Special Rapporteur

300. In summarizing the main trends of the debate, the Special Rapporteur observed that there was general agreement that the basic source of the immunity of State officials from foreign criminal jurisdiction was to be found in international law, particularly customary international law. He noted that some members had highlighted the importance of national practice and judicial decisions in this regard.

301. With respect to the notion of "immunity", general support had been expressed for the idea that it implied a legal relationship involving rights and corresponding obligations, and that it was procedural in nature (although one member had argued for its substantive character). It was also widely accepted that immunity of State officials from foreign criminal jurisdiction covered both executive and judicial jurisdiction and that it was particularly relevant in the pretrial phase. There were divergent views on the question whether the Commission should study the issue of jurisdiction: the Special Rapporteur explained that his intention was to consider analytically this issue in his future work, without however proposing draft articles on the subject.

302. As to the rationale of immunity, some members had acknowledged the existence of its mixed functional and representative components and that the different grounds of immunity were interrelated. The view had been expressed, however, that the immunity of different officials had different rationales. It had been argued, for example, that the immunity of the Head of State was to be justified by his or her status as personification of the State itself and that this ground would not be applicable to justify the immunity of other officials.

303. Members had also recognized that the distinction between immunity *ratione personae* and immunity *ratione materiae* was useful for methodological purposes, although, as the Special Rapporteur noted, it was seldom used in normative instruments.

304. The debates had also clarified the scope of the topic as understood by the Commission. The general perception was that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations were outside of the topic. The majority of members were also of the view that the question of immunity from international criminal jurisdiction was also to be excluded from the topic, although the Special Rapporteur indicated that, as suggested by some members and without prejudice to his future findings, he intended to consider the issue of international criminal jurisdiction when dealing with possible exceptions to immunity.

305. In light of the different opinions articulated on the issue of recognition, the Special Rapporteur suggested that the Commission could examine the possible effects of *non-recognition* of an entity as a State on whether immunity is granted to its officials.

306. On the scope of the topic with respect to the persons covered, the majority of members had favoured consideration of the status of all "State officials" and had supported the use of such term, which was to be defined in the future work of the Commission.

307. As to immunity *ratione personae*, there was broad agreement that it was enjoyed by Heads of State, Heads of Government and ministers for foreign affairs, but divergent views had been expressed as to its extension to other high-ranking officials. According to some members, personal immunity was limited to the three categories of officials mentioned above. Some other members confirmed the possibility that other State officials could enjoy personal immunity, but expressed concerns with respect to the idea of expanding such immunity beyond the "troika". Some other members favoured the idea of an extension of immunity, but pointed to the necessity of being very cautious in this regard: they recommended the identification of criteria, rather than an enumerative approach, to establish those other State officials to whom personal immunity might also be granted. The Special Rapporteur noted that further consideration should be given, in this regard, *inter alia* to the Judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.

308. Opinions seemed to be equally divided as to whether it was desirable for the Commission to look into the issue of immunity of family members of State officials. So far, at least, the debates had not persuaded the Special Rapporteur to reconsider his view according to which it was not feasible to deal with this issue under the present topic, but he would consider the issue further.

309. The Special Rapporteur also noted that it had been proposed that the Commission also consider the question of immunity of military personnel stationed abroad in times of peace.

310. The Special Rapporteur then turned to the prospective content of his subsequent report. He reiterated his intention to study therein the scope and limits of the immunity of State officials from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*), including the question of possible exceptions to immunity in the case of crimes under international law and official acts unlawfully carried out in the territory of a State exercising jurisdiction. He would consider, in particular: the relationship of immunity with peremptory norms of general international law (*jus cogens*) and with State responsibility; the effects on immunity of the implementation of universal jurisdiction for core crimes under international law; and the practice relating to other crimes, such as corruption or money-laundering. He would also examine the distinction between "official" and "private" acts for the purposes of immunity *ratione materiae*, notably the question whether the nature or gravity of an unlawful act could affect its qualification as an act carried out in an official capacity. The Special Rapporteur emphasized that the important question was whether there were exceptions to immunity under general international law, because the possibility to establish exceptions to immunity by concluding treaties was beyond any doubt. He would further analyse the immunities enjoyed by incumbent and former State officials. His subsequent report would finally look into the procedural aspects of immunity, notably the waiver of immunity and some questions raised by the recent Judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (such as whether the State which seeks to claim immunity for one of its officials should notify the authorities of the foreign State concerned or whether it should claim and prove that the relevant act was carried out in an official capacity).

311. The Special Rapporteur concluded with some comments on his methodology and approach to the topic. In his view, the 2002 Judgment of the International Court of Justice in the *Arrest Warrant* case was both a correct and also a landmark decision. It had been adopted by a large majority and contained a clear and accurate depiction of the current state of international law in this field. He emphasized that his reports would be based, first of all, on a careful study of State practice, international and national judicial decisions and the legal literature. With regard to judicial practice, he noted that the relevant decisions rendered by various tribunals should be examined taking into account their chronological sequence. As to domestic judicial decisions, they were relevant both *per se* and because they were based on materials by which States expressed their position on the subject matter. The Special Rapporteur also continued to think that decisions relating to immunity from civil jurisdiction could be significant for this topic. Lastly, he emphasized that his ultimate goal was not to formulate abstract proposals as to what international law might be, but to work on the basis of evidence of the existing international law in the field.

CHAPTER XI

THE OBLIGATION TO EXTRADITE OR PROSECUTE
(aut dedere aut judicare)

A. Introduction

312. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[710]

313. At its fifty-eighth (2006) and fifty-ninth (2007) sessions, the Commission received and considered the preliminary and second reports of the Special Rapporteur.[711]

B. Consideration of the topic at the present session

314. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/603), as well as comments and information received from Governments (A/CN.4/599).[712] The Commission considered the report at its 2984th, 2987th and 2988th meetings, on 24, 30 and 31 July 2008.

315. At its 2988th meeting, on 31 July 2008, the Commission decided to establish a Working Group on the topic under the chairmanship of Mr. Alain Pellet. The mandate and membership of the Working Group will be determined at the next session.

1. Introduction by the Special Rapporteur of his third report

316. The Special Rapporteur indicated that his third report aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic, in order for him to draw final conclusions on the main

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[710] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362-363).

[711] Respectively, A/CN.4/571 and A/CN.4/585 and Corr.1.

[712] For the comments and information before the Commission at its fifty-ninth session, see A/CN.4/579 and Add.1-4.

question whether the obligation to extradite or prosecute exists under customary international law. In this regard, the Special Rapporteur suggested that the Commission should renew its request for Governments to provide their comments and information on this topic.

317. Turning to the draft articles contained in the third report, the Special Rapporteur recalled that draft article 1, as proposed in the second report,[713] had been favourably received by the Commission. In the new version of this draft article,[714] the Special Rapporteur had taken into account the comments of the Commission and the Sixth Committee: thus, the adjective "alternative" had been replaced with "legal" to emphasize the legal character of the obligation, and three alternative wordings were suggested for the final phrase of the provision. The Special Rapporteur, however, had doubts as to the opportunity to delete the enumeration of the phases of formulation and application of the obligation ("establishment, content, operation and effects").

318. As regards draft article 2,[715] the Special Rapporteur proposed, in his report, four expressions that could be defined in the draft articles, but he invited the Commission to suggest other possible terms to be included in that provision. In his view, draft article 2 should remain open until the end of the work of the Commission on the topic. The bracketed phrase in paragraph 2 of this draft article (which extended the "without prejudice" clause to "other

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[713] A/CN.4/585, para. 76. For the text of that draft article, see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 350, note 563.

[714] Draft article 1 reads as follows:

Scope of application

> The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of the custodial State].

[715] Draft article 2 reads as follows:

Use of terms

1. For the purposes of the present draft articles:

    (a) "Extradition" means …;

    (b) "Prosecution" means …;

    (c) "Jurisdiction" means …;

    (d) "Persons under jurisdiction" means … .

2. The provisions of paragraph 1 regarding the use of terms in the present draft articles are without prejudice to the use of those terms or to the meanings which may be given to them [in other international instruments or] in the internal law of any State.

international instruments") mirrored similar provisions in treaties based on drafts elaborated by the Commission, such as the Vienna Convention on the Law of Treaties or the United Nations Convention on Jurisdictional Immunities of States and Their Property.

319. Draft article 3,[716] which had been suggested in the second report and was not opposed either in the Commission or in the Sixth Committee, reflected the rather general consensus as to the fact that international treaties are a recognized source of the obligation to extradite or prosecute. The Special Rapporteur noted that the increasing number of treaties containing this obligation could be an indication of State practice and lead to the beginning of the formulation of an appropriate customary norm.

320. The Special Rapporteur reiterated that future draft articles on this topic could draw inspiration from the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996.

321. The Special Rapporteur concluded by recalling that various initial questions on the topic remained unresolved. He thought that the Commission should find a compromise solution on how to address the problem of the mutual relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. As to the so-called "triple alternative" (consisting of the surrender of the alleged offender to a competent international criminal tribunal), he was of the view that a total rejection of the question was premature and that consideration should be given to recent domestic laws of implementation of the Rome Statute of the International Criminal Court.

2. Summary of the debate

(a) General comments

322. Some members commented on the methodology used in the third report. The Special Rapporteur was encouraged to actively engage into an analysis of the main questions arising from the subject and to make specific proposals for the Commission to move ahead with the

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[716] Draft article 3 reads as follows:

Treaty as a source of the obligation to extradite or prosecute

> Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

consideration of the topic, without awaiting comments and information from Governments. In so doing, the Special Rapporteur was invited to rely on the rich State practice and legal literature in the field.

323. Some members said that they abstained from commenting on the substantive issues that had already been addressed in previous reports, although it was noted that doubts persisted about various core questions arising from the topic. Some other members indicated their wish to comment on the report next year.

(b) Comments on the draft articles proposed by the Special Rapporteur

324. With respect to draft article 1 proposed by the Special Rapporteur, some members considered that it was unnecessary to qualify the obligation to extradite or prosecute as being "legal". These members also suggested that the last phrase of the provision should mirror the wording of article 1 of the European Convention on Human Rights ("within their jurisdiction"). It was proposed that the title of the article be modified to "Scope". Different views were expressed as to the opportunity to make explicit reference, in the text of the provision, to the "establishment, content, operation and effects" of the obligation. It was also indicated that the provision needed to be further elaborated by the Special Rapporteur.

325. As to draft article 2, the list of terms proposed by the Special Rapporteur received some support, although it was suggested that the concepts of "persons" and "persons under jurisdiction" should be defined separately, and that the expression "universal jurisdiction" should also be included in that list. The view was expressed that paragraph 2 was unnecessary, given the proviso contained in paragraph 1 ("For the purposes of the present draft articles").

326. It was indicated that the idea behind draft article 3, namely that treaties constitute a source of the obligation to extradite or prosecute, did not raise any controversy; according to one view, it was nevertheless important to state the principle explicitly in the draft articles to confirm that any treaty could constitute a direct source of the obligation without any need for additional legislative grounds. The Special Rapporteur was called to examine, in his commentary to this provision, the treaties that contain the obligation to extradite or prosecute. It was noted that the main question to be addressed remained that of the possible customary character of the obligation.

(c) Comments on the future work of the Commission on the topic

327. It was suggested that, in his subsequent report, the Special Rapporteur should continue to address general substantive issues and propose concrete articles relating to the obligation to extradite or prosecute, such as the question of its source (customary law, general principle of law), its relationship with universal jurisdiction, crimes that would be subject to the obligation (in particular, serious crimes under international law), and the so-called "triple alternative". The view was expressed that the Special Rapporteur, after having provided evidence of the customary character of the obligation, should proceed with the study of those substantive issues. The Special Rapporteur could thereafter undertake an examination of procedural questions, such as the possible grounds for denying extradition, the guarantees in case of extradition, or how to deal with simultaneous requests for extradition. Other pending questions mentioned in the debate were the following: whether it would be advisable to propose a working definition of what is intended by the obligation to extradite or prosecute; how the two terms of the obligation concretely operated; whether the obligation could apply when the person is not present on the territory of the State concerned; whether the obligation was triggered by a request for extradition.

328. According to another view, it might prove more expedient for the Commission to examine the elements of the obligation to extradite or prosecute independently from its source. It was therefore suggested that the Commission should consider, first, the conditions for the triggering of the obligation to prosecute, including the presence of the alleged offender on the territory of the State, the existence of a request for extradition that had been rejected, the State's jurisdiction over the crime concerned, etc. The Commission could then turn to the content of the obligation to prosecute and address issues such as how to reconcile that obligation with the discretion of the judicial power to prosecute, whether the availability of evidence affected the operation of the obligation, whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution, etc. In this manner, the Commission would provide States with a useful set of rules based on practice.

3. Concluding remarks of the Special Rapporteur

329. The Special Rapporteur noted that some members had focused their comments on the methodology adopted in his third report. Although he reiterated his remark that only a few States had provided their answers to the questions asked by the Commission, he agreed with the need to secure a more expeditious and independent approach to the topic.

330. With regard to draft article 1, as proposed in his third report, the Special Rapporteur indicated that he would review the text in light of the comments received, thus deleting the reference to the "legal" character of the obligation, which was considered redundant, and modifying the title. Members also seemed to favour the use of the expression "persons under their jurisdiction" in this provision. The debates had further shown that some members considered that the obligation arose only when the alleged offender was present on the territory of the State and that it was contingent to a request of extradition. The Special Rapporteur observed that divergent opinions had been expressed on the opportunity to refer to the phases of the obligation in the text of the draft article. Moreover, according to him, certain substantive issues required further consideration, in particular the determination of the exact nature and content of the obligation to extradite or prosecute and of the crimes that may be covered by this obligation.

331. Turning to draft article 2, the Special Rapporteur stated that he would consider the possibility of including the expressions "persons", "persons under jurisdiction" and "universal jurisdiction" among those requiring a definition by the Commission. As to draft article 3, he agreed with the view that its commentary should contain examples of the various treaties containing the obligation to extradite or prosecute.

332. With regard to the future work of the Commission on the topic, the Special Rapporteur announced that his fourth report would focus on the main substantive issues arising from the topic, such as the sources of the obligation to extradite or prosecute, and its content and scope. In so doing, he would make reference to the previous work of the Commission on the draft Code of Crimes against the Peace and Security of Mankind. As to the systematic structure of future provisions, he took note of the suggestion made by some members that the Commission make specific proposals on relevant procedural issues, such as the conditions for the triggering of the obligation to extradite or prosecute.

CHAPTER XII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

333. At its 2971st meeting, on 4 June 2008, the Commission established a Planning Group for the current session.

334. At its 2997th meeting, on 8 August 2008, the Commission took note of the proposed strategic framework for the period 2010-2011, concerning Programme 6 - Legal Affairs, Sub-programme 3, Progressive development and codification of international law.

335. The Planning Group held five meetings. It had before it Section G of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session entitled "Other decisions and conclusions of the Commission"; and General Assembly resolution 62/66 of 6 December 2007 on the Report of the International Law Commission on the work of its fifty-ninth session, in particular paragraphs 8, 9 and 14 to 25, as well as General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels.

1. Commemoration of the sixtieth anniversary of the Commission and meeting with Legal Advisers

336. The Commission notes that, as part of events to commemorate its sixtieth anniversary the Commission convened on 19 May 2008 a solemn meeting, during which statements were made by Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva; Ms. Micheline Calmy-Rey, Federal Counsellor of the Swiss Confederation; Mr. Nicolas Michel, Under-Secretary-General, the Legal Counsel of the United Nations; and the Chairman of the Commission, Mr. Edmundo Vargas Carreño. Mr. Srgian Kerim, President of the General Assembly of the United Nations delivered a video message, while Judge Rosalyn Higgins, President of the International Court of Justice delivered a keynote address.[717]

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[717] The keynote address of the President of the International Court of Justice and the statements of the Director General, the Legal Counsel and the Chairman of the Commission are available at the website on the Commission's work: www.un.org/law/ilc/.

337. The solemn meeting was followed by a one-and-a-half-day meeting with legal advisers on 19 and 20 May. The meeting was dedicated to the work of the Commission under the overall theme: "*The International Law Commission: Sixty Years ... And Now?*" It comprised a series of panel discussions involving Legal Advisers of member States, other international law experts and the Commission members, present and former, focusing on practical matters concerning the Commission and its cooperation with member States in the progressive development of international law and its codification.[718] The discussions proceeded on the basis of the Chatham House rules and no record was kept of the meeting.

338. The Commission deeply appreciates that many legal advisers, judges of the International Court of Judges, former members of the Commission and other international law experts joined the Commission in the celebrations. The Commission commends the Secretariat, together with the group of members of the Commission entrusted with the preparatory arrangements,[719] for the organization of the successful commemorative event.

339. The Commission also notes that the meeting with legal advisers provided a useful forum for interaction and considers it useful to have such meetings at least once during a quinquennium, preferably before the midpoint of the quinquennium.

340. The Commission also notes with appreciation that Member States, in association with existing regional organizations, professional associations, academic institutions and members of

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[718] The general introduction entitled "*What Role for the International Law Commission in the 21st Century?*" was given by Mr. Georges Abi-Saab. (a) Mr. Michael Wood, gave an introduction and chaired the first cluster of issues under the sub-theme "*A Subsidiary Organ Composed of Independent Experts: Is the Commission Adapted to its Purposes?*". The first panel on "*The Membership of the Commission: Profiles of a Codifier*" was led by Mr. A. Pellet and Mr. R.E. Fife (Norway). The second panel on "*The Commission and Governments: Mutual Indifference or Ongoing Interaction?*" was led by Mr. Z. Galicki and Mr. J.B. Bellinger (United States of America). (b) Mr. James Crawford gave an introduction and chaired the second cluster of issues under the sub-theme "*The Commission and its Methods of Work: How to Achieve the Mandate?*" Mr. D. Momtaz also chaired part of the session. The third panel on "*Within the Commission: Is There a Need to Renew the Methods of Work?*" was led by Mr. C. Yamada and A.E. Villalta (El Salvador). The fourth panel on "*Opening up the Commission: Sharing Experiences with Other Bodies?*" was led by Ms. P. Escarameia and Mr. A. Havas Oegroseno (Indonesia). Mr. Ahmed Mahiou gave an introduction and chaired the third cluster of issues under the sub-theme "*Prospects for the Commission: Which Outcomes for Future Topics?*". The fifth panel on "*Future topics for the Commission: The End of the Golden Age?*" led by Mr. E. Candioti and Ms. L. Lijnzaad (The Netherlands). The sixth panel addressed "*The Outcomes of the Commission's Work: Should Codification and Progressive Development Still Be Achieved Through Treaties?*" was led by Mr. J. Dugard and Ms. P. O'Brien (Ireland). Ms. Brigitte Stern offered general conclusions for the meeting.

[719] The members of the Group were as follows: Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. Z. Galicki, Mr. A. Pellet and Mr. C. Yamada. The Chairman of the Commission at the fifty-ninth session, Mr. I. Brownlie; and the Chairman of the Planning Group at the fifty-ninth session Mr. E. Vargas Carreño, served *ex officio*.

the Commission concerned, convened national or regional meetings, which were dedicated to the work of the Commission.[720] The Commission notes that such meetings, particularly at national and regional levels assist in the better understanding and appreciation of the role of the Commission in the progressive development and codification of international law and encourages Member States, in association with regional organizations, professional associations, academic institutions and members of the Commission concerned, to continue convening such events as appropriate.

2. Consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels

341. The General Assembly, by the terms of its resolution 62/70 on the rule of law at the national and international levels, *inter alia*, invited the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission is aware that the agenda item of the General Assembly on the rule of law at the national and the international levels covers a wider range of topics than those which are currently on its own agenda. The Commission is mindful of such other aspects of the General Assembly's agenda item.

342. In keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, the Commission continues to promote the progressive development and codification of international law. In its current work, the Commission has sought to comply with requests from the General Assembly and is preparing draft treaty texts, guidelines and other instruments on a significant range of legal issues. For each of the topics on the current work programme,[721] the Commission has adopted a systematic approach to the identification of the sources of the law, paying particular attention to treaties, State practice, *opinio juris*, general

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[720] Some of the activities made known to the Commission included: a Seminar organized by the Argentine Council of Foreign Relations and the Argentine Institute of Water Resources concerning the Integrated management of transboundary aquifers in Buenos Aires on 5 October 2007 and a publication entitled "*Temas recientes de la Comisión de Derecho Internacional*" was issued; a round table organized by the Latin American Society of International Law on "The 60th Anniversary of the International Law Commission: Contributions and Perspectives from Latin America" in Geneva on 21 May 2008; an event organized by the Graduate Institute of International and Development Studies on "The International Law Commission's Sixtieth anniversary: Results and perspectives" in Geneva on 28 May 2008; Peace through law: The Role of the United Nations International Law Commission. A colloquy on the Occasion of the Sixtieth Anniversary in Munich on 11 July 2008, to which all members of the Commission were invited.

[721] For the topics of the current programme of work of the Commission see Chapter I, para. 11.

principles, and judicial decisions of both national and international tribunals. Thus, in its current work, the Commission promotes the rule of law in international relations by applying generally accepted methods for the identification of the law: these methods give prominence to State actions and perceptions, while taking into account the practice of international organizations and, in appropriate instances, the increasing role of non-governmental organizations and individuals in world affairs.

343. In promoting the rule of law in international relations, the Commission is committed to the premise that States, regardless of considerations such as size, power and prominence, are all subject to binding rules of law. Generally, the Commission formulates draft rules that are designed to be universally applicable, and promotes the principle that where disputes arise as to the interpretation or application of rules these should be resolved by means of peaceful settlement. But although the Commission gives primacy to law in the conduct of international affairs, and seeks to formulate rules that give effect to this core principle of the rule of law, this approach does not always preclude a scope for reference to policy considerations on the part of international actors and the international community. In some instances, rules of law may themselves suggest or require the application of discrete policies, and in others the relative paucity of practice and other indicia of existing law encourage the Commission to make proposals *de lege ferenda*. In all instances, however, the Commission presupposes that the rule of law requires States, international organizations and other international entities to conduct their affairs with full deference to the law. This point is exemplified by the work of the Commission on the Effects of Armed Conflict on Treaties: implicit in the approach taken by the Commission here is the recognition that even in the case of armed conflict there are binding rules of law applicable to the behaviour of States.

344. At the international level, the rule of law also requires sensitivity to the content of particular rules. For matters on its current agenda, the Commission has been especially careful to ensure that the proposed rules reflect a balanced reconciliation of divergent State and non-State interests, having regard to established precedents. So, for example, with respect to rules being developed on transboundary aquifers, different perspectives are carefully weighed against each other in light of relevant technical and scientific information and broadly accepted principles of law. The importance of balancing different interests is also clearly reflected in the current

programme of work in topics pertaining to the Responsibility of International Organizations, the Obligation to Extradite or Prosecute, and Reservations to Treaties, among others. In essence, draft rules that balance different interests promote the rule of law by encouraging order, clarity and consistency in international relations. For some matters on its agenda, sensitivity to the content of rules may also provide the Commission with the opportunity to take directly into account human rights considerations, such as the dignity and security of the individual and fairness to individuals, in its formulation of draft rules. In this regard, topics such as the Expulsion of Aliens, the Immunity of State Officials from Foreign Criminal Jurisdiction and the Protection of Persons in the Event of Disasters require the careful assessment of generally accepted human rights standards in light of well-established principles of State sovereignty and non-intervention. Where the Commission promotes rules that uphold concepts such as fairness, security and justice for individuals without limiting the proper authority of the State, it assists in the development of the rule of law.

345. As one of a number of United Nations bodies working directly on legal issues, the Commission continues to cooperate with other international agencies in promoting the rule of law. The Commission's main role lies in the formulation of rules, an undertaking which it carries out in close collaboration with States in the General Assembly. However, the nature of the functions performed by the Commission does not lend itself to the kind of coordination at the Secretariat level described in the Report of the Secretary-General "Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law".[722] The Commission is also part of what has been characterized as a symbiotic relationship with the International Court of Justice, the highest judicial organ of the United Nations. Time and again, the Court has relied on treaties as binding instruments in themselves and other documents prepared by the Commission as cogent evidence of customary international law. Conversely, the Commission attaches the highest authority to the jurisprudence of the Court; for instance, in its current work on issues such as Reservations to Treaties and the Responsibility of International Organizations, the Commission has in many cases formulated proposed rules with direct reference to Court decisions or on the basis of arguments by analogy from pronouncements of the Court. The relationship between the Court and the Commission helps to promote the rule of law not only through the consistent and

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[722] A/61/636-S/2006/980, paras. 48-50.

transparent application of clear rules, but also by demonstrating that different law-determining agencies adopt the same approach to the identification of rules of international law. Regional and national courts, too, have sometimes been prepared to apply draft rules of the Commission as evidence of international law; thus, for example, various courts in recent years have expressly referred to propositions set out in the Commission's draft rules on the Responsibility of International Organizations. Such reference gives enhanced status to the relevant draft rules, and underlines the practical nature of the current contribution made by the Commission to the rule of law.

346. Overall, therefore, the Commission remains committed to the rule of law in all of its activities. Indeed, it may be said that the rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law. The Commission adopts a systematic approach to its work, and proposes practical solutions to international issues. In this way, it continues to build on a strong tradition that is now commemorating its sixtieth anniversary, a tradition that includes the preparation for major treaties such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on the Law of Treaties. In drafting general rules based on State practice and relevant activities of other international persons, the Commission takes advantage of the fact that its composition requires membership from the main legal systems of the world and from all regional groupings recognized within the United Nations system. It remains committed to the idea that all States, regardless of their circumstances, are subject to the primacy of law. It is sensitive to the fact that proposed rules which disregard divergent State and non-State interests will be of limited value. And, finally, by cooperating with other bodies that help to determine and apply the law, the Commission assists in ensuring that, at a time when tendencies towards fragmentation in the law are quite pronounced, some rules of law are applied uniformly by a cross-section of States and entities.

3. Relations between the Commission and the Sixth Committee

347. The Commission continued its consideration of ways in which the dialogue between the Commission and the Sixth Committee could be further enhanced in the light of calls contained in annual resolutions of the General Assembly. The Commission wishes to reiterate that its plenary meetings are open to interested delegations and that its draft reports, issued in the

A/CN.4/L… series as documents for limited distribution (L-documents) and usually adopted during the last week of the Commission's session, are available for advance perusal, subject to changes that may be made during the adoption stage. The draft reports are available on the Official Documents System of the United Nations (ODS).[723]

348. The Commission welcomes the continued practice of informal consultations in the form of focused discussions between the members of the Sixth Committee and the members of the Commission attending sessions of the General Assembly as a useful means to enhance dialogue on the various topics on the Commission's agenda.

349. The Commission is also aware that the informal meeting of Legal Advisers which is convened during the Sixth Committee's consideration of the Commission's report has, on its agenda, a variety of international law issues to discuss. In order to further enhance the discussion on the report of the Commission, it may be worthwhile to explore the possibility that the informal meeting of Legal Advisers identifies in advance of its meetings one or two topics on the agenda of the Commission which could be a subject of detailed discussion in such a forum, and where possible with the presence of the Special Rapporteur for the topic concerned.

350. The Planning Group agreed to keep under review the possibility of the Commission convening a part of its session in New York.

4. Working Group on Long-term Programme of Work

351. At its 1st meeting, on 4 June 2008, the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Enrique Candioti. At the same meeting, the Planning Group decided to refer to the Working Group for its consideration of the report of the Working Group on the most-favoured-nation clause.[724] The Chairperson of the Working Group on the Long-term Programme of Work submitted an oral progress report to the Planning Group on 28 July 2008. The Working Group recommended the inclusion in the long-term programme of work of two topics, namely "Treaties over time" on the

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[723] http://documents.un.org.

[724] The Planning Group recalled that at the 2944th meeting, on 27 July 2007, the Commission had considered the report of that Working Group and had decided to refer it to the Planning Group.

basis of a revised and updated proposal by Mr. G. Nolte and "The Most-Favoured-Nation clause" on the basis of the report of the 2007 Working Group chaired by Mr. D.M. McRae on the subject (A/CN.4/L.719). Both topics met the relevant criteria outlined by the Commission most recently in its 2000 report, namely, *inter alia*, they were concrete and feasible and presented theoretical and practical utility in terms of codification and progressive development of international law.[725] The syllabuses on the two topics are annexed to the present report. The inclusion of the two topics in the current programme of work of the Commission was proposed and the establishment, at the sixty-first session of the Commission, of study groups on the two topics was recommended.

352. The Commission endorsed the recommendation for the inclusion of the two topics on the long-term programme of work.

5. Inclusion of new topics on the programme of work of the Commission and establishment of study groups

353. At its 2997th meeting, on 8 August 2008, the Commission decided to include in its programme of work the topic "Treaties over time" and to establish a Study Group therefor at its sixty-first session.

354. At the same meeting, the Commission decided to include in its programme of work the topic "The Most-Favoured-Nation clause" and to establish a Study Group therefor at its sixty-first session.

6. Meeting with Legal Advisers of specialized agencies

355. The Commission took note that the 2009 meeting of Legal Advisers of international organizations within the United Nations system will take place in Geneva at a time that coincides with the session of the Commission. In accordance with article 26 (1) of its Statute, the Commission recommends that a joint meeting be organized with the Legal Advisers during the sixty-first session of the Commission in order to hold discussions on matters of mutual interest and requested the Secretariat to make appropriate arrangements to this effect.

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[725] *Yearbook … 2000*, vol. II, (Part 2), para. 728. See also *Yearbook … 1997*, vol. II (Part 2), para. 238.

7. Meeting with members of the Appellate Body of the WTO

356. In accordance with article 26 (1) of its Statute, the Commission on 27 May 2008 held a joint meeting with present and former members of the Appellate Body of the World Trade Organization.[726] During the meeting, members of the Commission and the present and former members of the Appellate Body held a useful exchange of views on matters of mutual interest, in particular discussions were held on alternative approaches to treaty interpretation: Application of articles 31-32 of the Vienna Convention on the Law of Treaties to ordinary treaties and constitutive instruments; procedures and guidelines for application of MFN clauses; and the relationship between international and municipal law: Standard of review applied by international bodies reviewing domestic acts.

8. Financial matters

(a) Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report

357. The Commission notes that, with a view to strengthening its relationship with the General Assembly, it has on previous occasions drawn attention to the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage.[727] It has also considered that presence of Special Rapporteurs facilitates exchanges of views and consultations between them and representatives of Governments.[728] In accordance with paragraph 5 of General Assembly resolution 44/35, the General Assembly invited the Commission, whenever circumstances so warrant, to request a Special Rapporteur to attend the session of the General Assembly during the discussion of the topic for which the Special Rapporteur is responsible and requested the Secretary-General to make the necessary

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[726] The present and former members attending were: Luiz Baptista (Brazil, current AB chair), Georges Abi-Saab (outgoing ABM, Egypt), A.V. Ganesan (outgoing ABM, India), Julio Lacarte (former ABM, Uruguay), Mitsuo Matsushita (former ABM, Japan), Yasuhei Taniguchi (outgoing ABM, Japan), Giorgio Sacerdoti (ABM, Italy), David Unterhalter (ABM, South Africa), Lilia Bautista (ABM, Philippines), Jennifer Hillman (ABM, United States), Yuejiao Zhang (incoming ABM, China) and Shotaro Oshima (incoming ABM, Japan).

[727] *Yearbook … 1988*, vol. II (Part 2), para. 582.

[728] *Ibid.*, 1989, vol. II (Part 2), para. 742.

arrangements within the existing resources. The Commission notes that due to financial constraints it has not been possible to make the necessary arrangements for more than one Special Rapporteur to attend meetings of the Sixth Committee. It wishes to emphasize that the post of Special Rapporteur is central to the work of the Commission and wishes to reiterate the usefulness of Special Rapporteurs being afforded the opportunity to interact with representatives of Governments during the consideration of their topics in the Sixth Committee.

(b) Honoraria

358. The Commission also reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which were expressed in its previous reports.[729] The Commission emphasized again that the above resolution especially affects the Special Rapporteurs, in particular those from developing countries, as it compromises support for their research work. The Commission urges the General Assembly to reconsider this matter, with a view to restoring, at this stage, the honoraria for Special Rapporteurs.

9. Documentation and publications

(a) Processing and issuance of reports of Special Rapporteurs

359. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function of progressive development and codification of international law. The Commission also wishes to stress that it and its Special Rapporteurs are fully conscious of the need for achieving economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind.[730]

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[729] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525-531. *Ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; and *Sixty-second Session, Supplement No. 10* (A/62/10), para. 379.

[730] For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II, Part Two, p. 132 and *Yearbook ... 1982*, vol. II, Part Two, pp. 123-4. See also resolution 32/151, para. 10 and resolution 37/111, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

(b) Establishment of a trust fund on the backlog relating to the *Yearbook* of the International Law Commission

360. The Commission notes with appreciation that, pursuant to paragraph 21 of General Assembly resolution 62/66, the Secretary-General had established a trust fund to receive voluntary contributions to address the backlog relating to the *Yearbook* of the International Law Commission.[731] While reiterating the importance of ensuring that the necessary budgetary resources are allocated for addressing the backlog under the relevant programme in the regular budget, the Commission appeals, in accordance with the terms of the trust fund, to Member States, non-governmental organizations, private entities and individuals to contribute to the trust fund. It reiterated that the *Yearbooks* were critical to the understanding of the Commission's work in the progressive development and codification of international law, as well as in the strengthening of the rule of law in international relations.

(c) Other publications and the assistance of the Codification Division

361. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and in preparation of research projects, by providing legal materials and their analysis. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of two excellent memoranda on the topic "Protection of persons in the event of disasters" (A/CN.4/590 and Add.1-3) and on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/596).

362. The Commission also expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[732] It acknowledged in particular the establishment of a new website on the *United Nations Juridical Yearbook*, including a full-text research option on all published volumes of the collection (currently in English). The Commission reiterated that the websites

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[731] As at 31 July 2008, the backlog for the period 1994-2001 was as follows: vol. II (Part One) in Arabic has not been issued since 1996. No volume has been issued in Chinese since 1994. Except for 1997, vol. II (Part One) in English has not been issued since 1996. Vol. II (Part One) in French has not been issued since 1998. Vol. II (Part One) has not been issued in Russian since 1998, except 2001. Vol. II (Part One) has not been issued in Spanish since 1996; vol. II (Part Two) in Spanish for 2001 has also not been issued. From 2002 to the present, no volume has been issued in any of the six official languages.

[732] Located at http://www.un.org/law/ilc/.

constitute an invaluable resource for the Commission in undertaking its work and for researchers of work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission would welcome the further development of the website on the work of the Commission with the inclusion of information on the current status of the topics on the agenda of the Commission.

B. Date and place of the sixty-first session of the Commission

363. The Commission decided that the sixty-first session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2009.

C. Cooperation with other bodies

364. The Commission was represented at the Forty-seventh session of the Asian-African Legal Consultative Organization, held in New Delhi from 30 June to 4 July 2008 by Mr. A. Rohan Perera.

365. At its 2982nd meeting, on 22 July 2008, Judge Rosalyn Higgins, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it,[733] drawing special attention to aspects that have a particular relevance to the work of the Commission. An exchange of views followed.

366. The Inter-American Juridical Committee was represented at the present session of the Commission by, Mr. Antonio Fidel Perez, who addressed the Commission at its 2978th meeting, on 15 July 2008.[734] He focused on the current activities of the Committee in different aspects of private and public international law. An exchange of views followed.

367. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) were represented at the present session of the Commission by the Chairman of the CAHDI, Mr. Michael Wood and the Director of Legal Advice and Public

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[733] This statement is recorded in the summary record of that meeting and is also placed on the website on the work of the Commission. See also www.un.org/law/ilc.

[734] This statement is recorded in the summary record of that meeting.

International Law, Mr. Manuel Lezertua, who addressed the Commission at its 2985th meeting, on 25 July 2008.[735] They focused on the current activities of CAHDI on a variety of legal matters. An exchange of views followed.

368. The Asian-African Legal Consultative Organization was represented by Mr. Narinder Singh, President of AALCO at its Forty-seventh session, who addressed the Commission at its 2988th meeting, on 31 July 2008.[736]He briefed the Commission on the outcome of work of AALCO at its forty-seventh session held in New Delhi.

369. The International Tribunal for the Law of the Sea was represented at the present session of the Commission by the President of the Tribunal, Judge Rüdiger Wolfrum, who addressed the Commission at its 2988th meeting, on 31 July 2008.[737] An exchange of views followed.

370. On 24 July 2008 an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest, such as responsibility of international organizations, definition of armed conflict, the Convention on Cluster munitions and rules pertaining to private security firms.

371. In order to ensure a better appreciation of each other's activities, the Commission would explore possibilities for enhancing the cooperation of the Commission with other bodies by making the meetings more focused and issues oriented, paying particular attention to the relationship between the work of the Commission and of the body concerned.

D. Casual vacancy

372. On 8 August 2008, the Commission elected Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland) to fill the casual vacancy caused by the resignation of Mr. Ian Brownlie.[738]

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[735] *Ibid.*

[736] *Ibid.*

[737] *Ibid.*

[738] The resignation of Mr. Brownlie was effective 8 August 2008, see ACN.4/602.

E. Representation at the sixty-third session of the General Assembly

373. The Commission decided that it should be represented at the sixty-third session of the General Assembly by its Chairman, Mr. Edmundo Vargas Carreño.

374. At its 2997th meeting, on 8 August 2008, the Commission requested Mr. Giorgio Gaja, Special Rapporteur on the topic of "Responsibility of international organizations", to attend the sixty-third session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.739.[739]

F. International Law Seminar

375. Pursuant to General Assembly resolution 62/66 of 6 December 2007, the forty-fourth session of the International Law Seminar was held at the Palais des Nations from 7 to 25 July 2008, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service in their country.

376. Twenty-seven participants of different nationalities, from all the regions of the world, were able to take part in the session.[740] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

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[739] "The General Assembly, ... 5. Invites the International Law Commission, when circumstances so warrant, to request a special rapporteur to attend the session of the General Assembly during the discussion of the topic for which that special rapporteur is responsible and requests the Secretary-General to make the necessary arrangements within existing resources."

[740] The following persons participated in the forty-fourth session of the International Law Seminar: Ms. Adineh Abghari (Iran), Ms. Dace Apine (Latvia), Ms. Stacie-Anne Marie Brown (Jamaica), Ms. Lalii Chin (Palau), Ms. Iryna Chyzheuskaya (Belarus), Mr. Juan Andrés Fuentes Véliz (Peru), Mr. Charlie Garnjana-Goonchorn (Thailand), Ms. Ruwanthika Gunaratne (Sri Lanka), Ms. Izevbuwa Ikhimiukor (Nigeria), Ms. Ivana Jelić (Montenegro), Mr. Klaus Keller (Germany), Mr. Blaise Koïvogui (Guinea), Mr. Paavo Kotiaho (Finland), Mr. Toufik Koudri (Algeria), Ms. Siami Leabo (Ivory Coast), Ms. Helyati Mahmud Saedon (Brunei Darussalam), Ms. Rudo Makunike (Zimbabwe), Mr. Cláudio Mate (Mozambique), Mr. Thang Nguyen Dang (Viet Nam), Ms. Jeanette Sautner (Canada), Ms. Sabrina Urbinati (Italy), Mr. Gustavo Velasquez (Equator), Mr. Leandro Vieira Silva (Brazil), Mr. Andres Villegas Jaramillo (Colombia), Ms. Marise Warner (Trinidad and Tobago), Ms. Tahmina Yolchiyeva (Azerbaijan), Mr. Ahmed Zaki (Egypt), Mr. Gentian Zyberi (Albania). The Selection Committee, chaired by Ms. Vera Gowlland-Debbas (Professor at the Graduate Institute of International and Development Studies - Geneva), met on 29 April 2008 and selected 28 candidates out of 107 applications for participation in the Seminar. At the last minute, the twenty-eighth candidate selected failed to attend.

377. The Seminar was opened by Mr. Edmundo Vargas Careño, Chairman of the Commission. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar, assisted by Mr. Vittorio Mainetti, Legal Consultant at UNOG.

378. The following lectures were given by members of the Commission: Mr. Giorgio Gaja: "*Responsibility of International Organizations*"; Mr. Chusei Yamada: "*Codification of the Law of Shared Natural Resources*"; Mr. Enrique Candioti: "*Future Topics for the International Law Commission*"; Mr. John Dugard: "*The Outcomes of the Commission's Work*"; Mr. Zdzislaw Galicki: "*The Obligation to Extradite or Prosecute (Aut dedere aut judicare)*"; Mr. Lucius Caflisch: "*The Legal Regime of Maritime Wrecks*"; Ms. Marie Jacobsson: "*The Legal Regime of Historic Wrecks and of maritime graves*"; Mr. A. Rohan Perera: "*Towards a Comprehensive Convention on Terrorism*"; Mr. Donald McRae: "*The MFN Clause*"; Mr. Georg Nolte: "*Cultural Diversity in International Law*"; Judge Bruno Simma of the International Court of Justice and former member of the Commission, addressed the participants of the Seminar on: "*ILC and ICJ: A Symbiotic Relationship*".

379. Lectures were also given by Mr. Vittorio Mainetti, Assistant to the Director of the International Law Seminar: "*Introduction to the Work of the International Law Commission*"; Mr. Daniel Müller, Assistant to the Special Rapporteur Mr. Alain Pellet: "*Reservations to Treaties*"; and Ms. Jelena Pejic, Legal Adviser of International Committee of the Red Cross: "*Current Challenges to International Humanitarian Law*".

380. Seminar participants were invited to visit the World Trade Organization (WTO) and attended briefing sessions by Ms. Gabrielle Marceau, Counsellor to the Director General, and Mr. Werner Zdouc, Director of the WTO Appellate Body Secretariat. The discussion focused on the current legal issues at the WTO and on the WTO Disputes Settlement System.

381. A special session dedicated to the "Peaceful Settlement of International Disputes" was organized in the premises of the Graduate Institute of International and Development Studies of Geneva (HEID). Seminar participants attended lectures given by Mr. Marcelo Kohen: "*The Notion of Peaceful Settlement of International Disputes*"; Ms. Vera Gowlland-Debbas:

"*The International Court of Justice As Principal Judicial Body of the United Nations*"; and Mr. Georges Abi-Saab (Member and former Chairman of the WTO Appellate Body): "*The Transformation of the Judicial Function*".

382. Two Seminar working groups on "*The Obligation to Extradite or Prosecute*", and "*Reservations to Treaties*" were organized. Each Seminar participant was assigned to one of them. Mr. Zdzislaw Galicki, a member of the Commission; and Mr. Daniel Müller provided guidance to the working groups. Each group wrote a report and presented their findings to the Seminar in a special session organized for this purpose. A collection of the reports was compiled and distributed to all participants.

383. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall followed by a reception.

384. The Chairman of the Commission, the Director of the Seminar, Mr. Ulrich von Blumenthal and Ms. Adineh Abghari (Islamic Republic of Iran), on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-fourth session of the Seminar.

385. The Commission noted with particular appreciation that during the last three years the Governments of Austria, China, Cyprus, Finland, Germany, Hungary, Ireland, Mexico, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 16 candidates and partial fellowships (subsistence only) were awarded to 4 candidates.

386. Since 1965, 1,006 participants, representing 162 nationalities, have taken part in the Seminar. Of them, 618 have received a fellowship.

387. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the

Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2009 with as broad participation as possible.

388. The Commission noted with satisfaction that in 2008 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.

Annex A

Treaties over time
in particular:
Subsequent Agreement and Practice

(Mr. Georg Nolte)

A. Introduction

1. Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfil the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.

2. The general question of "treaties in time" reflects the tension between the requirements of stability and change in the law of treaties. On the one hand, it is generally the purpose of a treaty and of the law of treaties to provide stability in the face of evolving circumstances. On the other hand, legal systems must also leave room for the consideration of subsequent developments in order to ensure meaningful respect for the agreement of the parties and the identification of its limits.

3. It is important in any legal system to determine how subsequent acts, events and developments affect existing law. In national law, the most important subsequent developments after the enactment of a law, or the conclusion of a contract, are amendments by the legislature or by the parties to the contract, and evolutive interpretations by courts. In international law, the situation is more complicated. Different sources, in particular treaty and customary law, are subject to different rules and mechanisms; moreover, they interact with each other.

4. In the case of customary law, a given rule is the result of a process combining certain acts, accompanying expressions of legal evaluation and reactions thereto (State practice and *opinio iuris*). This process is, in principle, continuing in time and makes the given rule an object of constant reaffirmation or pressure to change. Thus, in the case of customary law, subsequent acts, events and developments are, in principle, part of and not different from the process of formation of customary law itself.

5. In treaty law, on the other hand, the treaty and the process of its conclusion must be clearly distinguished from subsequent acts, events and developments which may affect the existence, content or meaning of the said treaty. A treaty is a formalized agreement between States and/or other subjects of international law which is designed to preserve the agreement in a legally binding form over time. Therefore, subsequent acts, events or developments can affect the existence, content or meaning of a treaty only under certain conditions. It is in the interest of the security of treaty relations that such conditions should be well-defined. The judgment of the International Court of Justice in the *Gabcikovo-Nagymaros* case[1] provides a good example of how the law of treaties operates in relation to subsequent acts, events and developments which may affect the existence, content or meaning of a treaty.

6. It is suggested that the Commission revisit the law of treaties as far as the evolution of treaties over time is concerned. Problems arise frequently in this context. As certain important multilateral treaties reach a certain age, they are even more likely to arise in the future.

7. One aspect of the topic "treaties over time" should be the role which subsequent agreement and subsequent practice of States parties play in treaty interpretation, in particular in relation to a more or less dynamic treaty interpretation on the basis of the purpose of a treaty rule (see more specifically below sub B.-E.). The evolution of the legal context or the emergence in international society of new needs can be taken into account if the pertinent treaty is considered as a "living instrument".

8. Another dimension of the topic "treaties over time" would be the effect which certain acts, events or developments have on the continued existence, in full or in part, of a treaty. The most obvious questions in this context concern the termination or withdrawal (arts. 54, 59 and 60 VCLT), denunciation (art. 56 VCLT) and suspension (arts. 57, 58 and 60 VCLT) of treaties, and the related question of their inter-temporal effects. The Vienna Convention considers a number of causes for termination or suspension of the effects of a treaty: some clearly relate to the passage of time, such as the question of termination of treaties which contains no provision regarding their termination and which do not provide for denunciation or withdrawal (art. 56) or

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[1] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7.

the supervening change of circumstances (art. 62). The formation of a customary rule derogating from the treaty, which may imply the desuetude of a treaty in whole or in part, is not addressed in the Vienna Convention as a ground for the termination of the treaty, although it is arguably one of such causes.

9. Still another dimension of the topic would be the effect which supervening treaties or customary law have on a particular treaty. This concerns the modification of a treaty by way of the conclusion of one or more later treaties (art. 41 VCLT), but also the modification of a treaty by way of a supervening rule of customary international law. A specific issue in this context would be the emergence of a new peremptory norm of general international law (art. 64 VCLT) and its inter-temporal effects.

10. A fourth aspect of the effects of time on a treaty is the possible obsolescence of some of its provisions. This is particularly significant with regard to law-making treaties. The need to revise certain treaties has been met with clauses providing for review mechanisms, but in the case of most treaties the issue of their possible future obsolescence has not been considered.

B. In particular: the topic of subsequent agreement and subsequent practice with respect to treaties

11. International law has a specific feature which is designed to ensure that evolving circumstances are taken into account in a way which is compatible with the agreement of the parties. This feature is referred to in articles 31 (3) (a) and (b) VCLT. It consists of the recognition of the role that subsequent agreement and subsequent practice play in the interpretation of a treaty. Both means of interpretation are of considerable practical importance. International tribunals and other dispute settlement organs have referred to and applied articles 31 (3) (a) and (b) VCLT in a large number of cases. This is true for the International Court of Justice (ICJ)[2] as well as its predecessor, the Permanent Court of

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[2] See only case concerning the *Temple of Preah Vihear, (Cambodia v. Thailand) merits I.C.J. Reports* p.6 at pp. 33-34; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Reports 1962*, p. 160; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 22, para. 22; the Court makes further references to its case law in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1045, para. 50.

International Justice (PCIJ).[3] Subsequent practice has also played an important role in arbitral awards,[4] the jurisprudence of the Iran-United States Claims Tribunal,[5] the International Tribunal for the Law of the Sea,[6] the European Court of Human Rights,[7] the International Tribunal for the Former Yugoslavia[8] and in reports of the WTO Panels and of its Appellate Body.[9] In addition, domestic courts repeatedly refer to subsequent practice as a means of determining the impact of a given treaty on the domestic legal order.[10]

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[3] See only *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, Series B No. 2, pp. 38-40; *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, Series B No. 12, p. 24; *Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 26 December 1926, Series B No. 14, p. 27, pp. 62-63; *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 24 September 1927, Series B, No. 15, p. 18.

[4] See only *The Chamizal Case (Mexico v. United States)*, Award of 15 June 1911, UNRIAA, vol. XI, pp. 323-235; *Affaire de l'indemnite russe (Russia v. Turkey)*, Award of 11 November 1912, UNRIAA, vol. XI, p. 433; *Interpretation of the air transport services agreement between the United States of America and France (USA v. France)*, Award of 22 December 1963, UNRIAA, vol. XVI, pp. 5-74; *Interpretation of the air transport services agreement between the United States of America and Italy (USA v. Italy)*, Award of 17 July 1965, UNRIAA, vol. XVI, pp. 75-108, 100; *Beagle Channel Arbitration (Argentine v. Chile)*, Award of 18 February 1977, UNRIAA, vol. XXI, p. 53; *Delimitation of the Continental Shelf (UK v. France)*, Award of 30 June 1977, UNRIAA vol. XVIII, p. 3; *Taba Arbitration (Egypt v. Israel)*, Award of 29 September 1988, UNRIAA XX, pp. 56-7, paras. 209-211; *Affaire de la Délimitation de la frontière maritime (Guinée/Guinée-Bissau)*, 14 February 1985, UNRIAA vol. XIX, p. 175, para. 66; *Southern Bluefin Tuna Case (Australia and New Zealand/Japan)* Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA, vol. XXII, pp. 1-57, 45-6; *Affaire relative au régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France* (2003), RGDIP 107 (2003), 221 et seq., para. 70.

[5] *The United States of America, et al. v. The Islamic Republic of Iran, et al.*, Award of 25 January 1984, *Iran-US C.T.R.*, vol. 5, p. 71; *Houston Contracting Company* v. *National Iranian Oil Company, et al*, Award of 22 July 1988, *Iran-US C.T.R.*, vol. 20, pp. 56-57.

[6] M/V 'Saiga' Case *(No. 2) (Saint Vincent and the Grenadines* v. *Guinea)* Judgment, ITLOS Reports, 1 July 1999.

[7] *Case of Soering v. United Kingdom*, Judgment (Merits and Just Satisfaction), 7 July 1989, Application No. 14038/88; *Loizidou v. Turkey*, Judgment (Merits and Just Satisfaction), 18 December 1996, Application No. 15318/89, ECHR, 1996-VI, p. 2236; *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], Application No. 52207/99, ECHR 2001-XII; *Öcalan v. Turkey*, Judgment, 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

[8] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, A. Ch, Judgment of 15 July 1999.

[9] See only Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* (1 November 1996) WT/DS8/R, WT/DS10/R, WT/DS11/R; Appellate Body Report, *European Communities-Customs Classification of Certain Computer Equipment* (22 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1851; Panel Report, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (9 May 2006) WT/DS294/R, paras. 7.214-7.218; Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (23 October 2002) WT/DS207/R, paras. 7.78-7.101; *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (12 September 2005) WT/DS269/AB/R, paras. 253-60, 271-3; Appellate Body Report, United States *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, pp. 64-66, paras. 190-95.

[10] See e.g. *Medellin v. Texas*, Judgment of 25 March 2008, 552 U.S._(2008) (Slip opinion at pp. 20-21); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *R. v. Sec. of State, on Application of*

12. The Commission addressed this topic between 1957 and 1966 as part of its work on the Law of Treaties.[11] Later, the Commission considered the topic briefly in connection with the draft articles on treaties concluded between States and international organizations or between two or more international organizations.[12] Finally, the Study Group on the "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", briefly touched on the topic of subsequent agreement and subsequent practice with respect to treaties.[13]

Channel Tunnel Group, 23 July 2001, ILR vol. 125 (2004), 125, pp. 580, 597, para. 48; *Morris v. KLM Royal Dutch Airlines* [2002] UKHL7, 2 AC 628, ILDC 242 (UK 2002); *Attorney-General v. Zaoui*, [2005] NZSC 38, ILDC 81 (NZ 2005); *A. v. B., Swiss Federal Supreme Court*, 1st Civil Law Chamber, 8 April 2004, BGE 130 III 430, ILDC 343 (SW 2004); *Bouzari v. Iran (Islamic Republic of)* (2004), 243 D.L.R. (4th) 406, ILDC 175 (CA 2004).

[11] *Gerald Fitzmaurice*, Second Report on the Law of Treaties, A/CN.4/107, *Yearbook ... 1957*, vol. II, pp. 22, 25, 39, 44, 68; *Humphrey Waldock*, First Report on the Law of Treaties, A/CN.4/144 and Add.1, *Yearbook ... 1962*, vol. II, p. 69; Second Report, A/CN.4/156 and Add.1-3, *Yearbook ... 1963*, vol. II, pp. 60, 64, 66, 69-71, 80; Third Report, UN doc. A/CN.4/167 and Add.1-3, *Yearbook ... 1964*, vol. II, pp. 39, 40, 52, 53, 55, 59, 60, 62; Fourth Report, A/CN.4/177 and Add.1 and 2, p. 49; Fifth Report, A/CN.4/183 and Add.1-4, p. 28; Sixth Report, A/CN.4/186 and Add.1, 2/Rev.1, 3-7, *Yearbook ... 1966*, vol. II, draft article 68 at pp. 87-91, draft article 69 at pp. 91-99, 101; *15th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1963, *Yearbook ... 1963*, vol. I, 687th meeting, p. 89; 689th meeting, p. 100; 690th meeting, p. 109; 691st meeting, pp. 116, 121; 694th meeting, pp. 136, 139; 706th meeting, p. 224; 707th meeting, p. 226; 712th meeting, p. 269; 720th meeting, p. 316; *16th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1964, *Yearbook ... 1964*, vol. I, 729th meeting, pp. 39, 40; 752nd meeting, p. 190; 753rd meeting, pp. 192, 193; 758th meeting, p. 230; 765th meeting, p. 276, pp. 278, 279; 766th meeting, p. 282, pp. 284-286, 288; 767th meeting, pp. 296-298; 769th meeting, pp. 308-311, 313; 770th meeting, pp. 316, 318; 773rd meeting, p. 332; 774th meeting, p. 340; *17th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1965, *Yearbook ... 1965*, vol. I, 790th meeting, p. 105; 799th meeting, p. 165; 802nd meeting, p. 191; A/CN.4/SER.A/1966, *Yearbook ... 1965*, vol. I, Part I, 830th meeting, pp. 55, 57; *18th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1966, *Yearbook ... 1966*, vol. I, Part II, 857th meeting, p. 96; 859th meeting, pp. 113, 114; 866th meeting, p. 166; 870th meeting, p. 126; 871st meeting, p. 197; 883rd meeting: draft article 68 was adopted as article 38, pp. 266, 267; 893rd meeting, draft article 69 was adopted as article 27, pp. 328f.

[12] Paul Reuter, *Third report on treaties concluded between States and International Organizations or between two or more International Organizations*, A/CN.4/279 and Corr.1, *Yearbook ... 1974*, vol. II, Part I, p. 148; Fourth report, A/CN.4/285 and Corr.1, *Yearbook ... 1975*, vol. II, p. 44; *29th Session of the Commission*, A/CN.4/SER.A/1977, *Yearbook ... 1977*, vol. I, 1438th meeting, pp. 123f.; 1458th meeting, pp. 234, 235; *31st Session of the Commission*, A/CN.4/SER.A/1979, *Yearbook ... 1979*, vol. I, 1548th meeting, p. 77; *33rd Session of the Commission*, A/CN.4/SER.A/1981, *Yearbook ... 1981*, vol. I, 1675th meeting, p. 169; *34th Session of the Commission*, A/CN.4/SER.A/1982, *Yearbook ... 1982*, vol. I, 1702nd meeting, p. 22, 1740th meeting, adopted article 31, pp. 251, 252, 260.

[13] Report, UN doc. A/CN.4/L.663/Rev.1 of 28 July 2004, p. 19: "relations between article 30 (subsequent agreements), 41 (inter se modification) and Article 103 of the United Nations Charter (priority of the Charter obligations)"; report finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 of 13 April 2006, pp. 13, 60, 214, 233, 241, 251, 252.

C. Should the International Law Commission examine the topic of subsequent agreement and subsequent practice with respect to treaties?

13. Despite their great practical importance the means of interpretation contained in articles 31 (3) (a) and (b) VCLT have hardly been analysed by international tribunals beyond what the cases at hand required. In addition, these means of interpretation have rarely been the subject of extensive empirical, comparative or theoretical research. In fact, relevant subsequent agreement and subsequent practice of States is not always well-documented and often only comes to light in legal proceedings.

14. As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[14]

15. The interest in clarifying the legal significance and effect of subsequent agreement and subsequent practice is enhanced by the increasing tendency of international courts to interpret treaties in a purpose-oriented and objective manner. Before the adoption of the VCLT it was an open question whether a more objective or more subjective method of treaty interpretation should prevail.[15] While the VCLT already puts a stronger emphasis on objective factors, the trend towards objective treaty interpretation is continuing. The arbitral tribunal in the 2005 *Iron Rhine* case has, for example, maintained that an evolutive interpretation would ensure an

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[14] On the relation of change and the *clausula rebus sic stantibus* see *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, *I.C.J. Reports* 1997, 7, para. 104.

[15] On the historical development see Rudolf, Bernhardt, "Interpretation in International Law", in (ed.), *Encyclopedia of Public International Law*, vol. II (1995), pp. 1416-1426, 1419 et seq.

application of the treaty that would be effective in terms of its object and purpose. The tribunal emphasized that this would "be preferred to a strict application of the intertemporal rule".[16] At a time when international law is faced with a "proliferation of international courts and tribunals",[17] an evolutive interpretation of treaties is, on the one hand, a method to ensure a treaty's effectiveness. On the other hand, an evolutive interpretation can lead to a reinterpretation of the treaty beyond the actual consent of the parties. This makes reference to subsequent practice less predictable and more important at the same time: if the invocation of subsequent practice is not limited to elucidating the actual and continuing agreement of parties[18] treaty interpretation can become less predictable but subsequent practice can become more important when it is used as evidence of a dynamic understanding of treaty instruments (e.g. when the European Court of Human Rights speaks about the Convention as a "living instrument, which must be interpreted in the light of present day conditions"[19]).

16. Subsequent agreement and subsequent practice also affect the so-called fragmentation and diversification of international law. The Report of the ILC Study Group,[20] however, merely took note of the issue of subsequent practice.[21] This may be the reason why it was suggested in the Sixth Committee in 2006 that the Commission consider the subject of adaptation of international treaties to changing circumstances, with a special emphasis on the field of subsequent agreements and subsequent practice.[22]

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[16] *In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. The Netherlands)*, Permanent Court of Arbitration, Award of the Arbitral Tribunal, 24 May 2005, para. 80.

[17] See Jonathan I. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 697 et seq.; Benedict Kingsbury, "Is the Proliferation of International Courts and Tribunals a Systemic Problem?", *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 679 et seq.

[18] *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, Series B, No. 12, p. 24.

[19] *Tyrer v. the United Kingdom*, Judgment, 25 April 1978, Application No. 26, para. 31; *Marckx v. Belgium*, Judgment, 13 June 1979, Application No. 31, para. 41; *Airey v. Ireland*, Judgment, 9 October 1979, Application No. 32, para. 26; ECHR, *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, Application No. 310, para. 71.

[20] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

[21] See *ibid.*, p. 13, para. 12; p. 60, para. 109; p. 116, footnote 288; p. 179, para. 354; p. 208, para. 412; p. 233, para. 464; p. 241, para. 476.

[22] Topical Summary of the discussion held in the Sixth Committee, UN doc. A/CN.4/577/Add.1, 27 January 2007, para. 31.

17. A final reason why subsequent agreement and subsequent practice as a means of interpretation of treaties should be studied results from their implications on the domestic level. In the United Kingdom, Lord Nicholls has noted in a recent decision of the House of Lords that subsequent practice would not be the right way to modify a treaty, an end which should only be achieved through an amendment procedure.[23] In the United States, the Supreme Court has recently interpreted a treaty by relying on the "postratification understanding" of the parties".[24] The question of the significance of subsequent practice as a means of treaty interpretation is regarded in the United States as being part of the larger question which effects different sources of international law have in domestic law, and which source of international law favours a larger role of the United States Senate.[25] While the United States Supreme Court has been reluctant to consider recently developed customary law when interpreting international agreements,[26] it has more openly referred to subsequent practice in some cases.[27] This aspect of the question is important for other countries as well.[28] In Germany, for example, the Federal Constitutional Court has recently reviewed the question of whether certain informal agreements and certain practical steps taken by NATO member States are evidence of a legitimate reinterpretation of the NATO treaty, or whether such agreements and practical steps should be seen as modifications of the NATO Treaty which would require renewed parliamentary approval. While the German Court has held that all steps taken so far have remained within the confines of legitimate treaty

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[23] *King v. Bristow Helicopters Ltd*, UK House of Lords, [2002] UKHL 7, [2002] 2 AC 628, ILDC 242 (UK 2002), para. 98.

[24] *Medellin v. Texas*, Judgment of 25 March 2008, 552 United States (2008) (Slip opinion at pp. 20-21) with further references.

[25] For an overview see John Norton Moore, "Treaty Interpretation, the Constitution, and the Rule of Law", *Virginia Journal of International Law*, vol. 42 (2001), pp. 163-263; Phillip R. Trimble & Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, *Berkeley Law Review*, vol: 16 (1998), p. 55 et seq.

[26] In *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), note 15, Justice Rehnquist wrote: "(t)he practice of nations under customary international law" is "of little aid in construing the terms of an extradition treaty or the authority of a court to later try an individual who has been so abducted".

[27] See, in addition to *Medellin v. Texas* (footnote 24 above), e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

[28] See Anthony Aust, "Domestic Consequences of Non-Treaty (Non-Conventional) Law-Making", in Rüdiger Wolfrum/Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, 2005, pp. 487-496; and Francisco Orrego Vicuña, "In Memory of Triepel and Anzilotti: The Use and Abuse of Non-Conventional Lawmaking", *ibid.*, pp. 497-506; for a view on United States jurisprudence see David J. Bederman, "Revivalist Canons and Treaty Interpretation", *UCLA Law Review*, vol. 41 (1994), p. 953 et seq., pp. 972 et seq.

interpretation by way of subsequent agreement and subsequent practice,[29] such cases reflect a widespread concern on the side of political actors that domestic control mechanisms concerning the conclusion and application of treaties may be bypassed. A former judge of the European Court of Human Rights has described treaties as being "set on wheels" by the processes of subsequent agreement and subsequent practice.[30]

18. Subsequent agreement and subsequent practice are not only pertinent for ordinary inter-State treaties, but also for those treaties that are constituent instruments of an international organization (art. 5 VCLT). By virtue of operating in and engaging with international organizations, member States display forms of subsequent agreement and subsequent practice that are relevant to the evolving interpretation of the constituent treaties of such organizations. However, the Commission has in the past sometimes kept projects on international organizations apart (in particular the projects on the law of treaties and on international responsibility). The question of the relevance of organizational practice, and the reactions of member States to this organizational practice, will indeed not always be judged according to the same standards as those which are applicable to ordinary inter-State treaties.[31] However, since these two areas are so closely interrelated it would be artificial to distinguish between them. One caveat may, however, be in order: while some the best-known examples of relevant organizational practice concern the United Nations,[32] it could be considered to exclude the practice of the main bodies of the United Nations from the inquiry, should there be concerns about possible limitations to the development of the United Nations system as a whole. Other United Nations organs,

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[29] *Parliamentary Group of the Partei des Demokratischen Sozialismus v. Bundesregierung*, 22 November 2001, BVerfGE 104, 151; *Parliamentary Group of the Partei des Demokratischen Sozialismus/Linkspartei v. Bundesregierung*, 3 July 2007, case No. 2 BvE 2/07.

[30] Georg Ress, "Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge", in Walther Fürst *et al.* (eds.), *Festschrift für Wolfgang Zeidler*, vol. 2, Berlin 1987, pp. 1775 et seq., 1779.

[31] C.F. Amerasinghe, Principles of the Institutional Law of International Organizations, Cambridge, 2nd ed. 2005, at pp. 49 seq., 290 seq. and 460 seq.

[32] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, *I.C.J. Reports 1950*, pp. 8 seq.; *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, *I.C.J. Reports 1962*, pp. 160, 162, 165, 168 seq., 177-179; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16, paras. 21-22; Bruno Simma/Stefan Brunner/Hans-Peter Kaul, "Article 27", in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. I, Oxford, 2002, pp. 493 seq., para. 46 seq.; Michael Bothe, "Peace-keeping", in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. I, Oxford, 2002, p. 685, paras. 86 and 91 seq.; *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 180.

organizations and treaty bodies, however, do not raise similar concerns and should be reviewed. In addition, generally recognized rules and principles that were developed with the practice of the United Nations organs in mind should be reviewed as to their applicability to other treaties and actors.

D. The goal and the possible scope of consideration of the proposed topic

19. The goal of considering the topic of subsequent agreement and subsequent practice with respect to treaties would be twofold.

20. The first goal would be to establish a sufficiently representative repertory of practice. Such a repertory would serve an important practical purpose. So far, the actual practice of subsequent agreement and subsequent practice with respect to treaties has never been collected in more than a random fashion. Although the importance of these means of treaty interpretation is generally acknowledged, their actual significance has not been identified in a systematic fashion, but only in judicial proceedings or when the case arose. Collecting examples of relevant subsequent agreement and subsequent practice and systematically ordering them is not merely a value in itself, as this could form the basis for orientation in analogous cases. Although such a collection certainly could not aspire to completeness, it would nevertheless provide an exemplary overview. This would be helpful for practitioners who would then more easily be able to reason from analogy. A repertory should also provide courts and tribunals with illustrative guidance on the relevance of subsequent agreement and practice. Without such guidance, judicial bodies might too easily identify what they consider to be the object and purpose of a treaty, thereby possibly overlooking the continuing role of States in treaty interpretation.

21. The task of compiling a repertory is not simply a matter that can be done equally well by an academic research institute. Although States do not consider it to be a secret, some instances of subsequent agreement and practice are simply not available in the public realm. The Commission is the best possible forum to determine whether certain activities can indeed be classified as relevant practice. With the help of its members, it is also the best and most legitimate source for obtaining relevant instances of subsequent agreement and subsequent practice. Of course, the process of collecting material cannot be conducted in the style of a fishing expedition, but must rather be based on a carefully formulated questionnaire.

22. The second and more important goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a Draft Convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.

23. The following specific issues could be addressed within this general framework:

(a) Delimitation of subsequent agreement and subsequent practice;

(b) Types of subsequent agreements and subsequent practice;

(c) Relevant actors or activities;

(d) Constituent elements;

(e) Substantive limits;

(f) Treaty modification and informal means of cooperation;

(g) Special types of treaties;

(h) Customary international law and systemic integration.

(a) Delimitation of subsequent agreement and subsequent practice

24. The delimitation between the various means of interpretation provided for in article 31 (3) VCLT is not clear. While the Commission has shed some light on the principle of systemic integration (art. 31 (3) (c) VCLT),[33] the boundary between subsequent agreement and subsequent practice is rather fluid. It is accepted that subsequent agreement can take various forms.

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[33] Fragmentation Report, (footnote 20 above), paras. 410-480.

Subsequent agreement therefore may be present when there is simply a decision adopted by a meeting of the parties to a treaty, as was the case when EU member States changed the denomination of the ECU to the Euro.[34] Since subsequent agreement presupposes the consent of all the parties, it seems to imply a higher degree of formality than subsequent practice.

25. Subsequent practice relies on the establishment of a subsequent agreement of the parties to a treaty. It is generally required to be concordant, common and consistent.[35] As Special Rapporteur *Sir Humphrey Waldock* put it, "(t)o amount to an authentic interpretation, the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally".[36] However, the problem lies in how to establish this tacit assent. In this context, the notions of acquiescence and *estoppel* are used to determine whether a party has given its implied consent to a practice by another party. The exact meaning of those principles is subject to considerable debate.[37] While it may not be possible to arrive at definite conclusions in this respect, an analysis of State and organizational practice would probably give some general orientation.

(b) Types of subsequent agreements and subsequent practice

26. A study would try to identify different types of subsequent agreements and subsequent practice, or certain distinctions which could aid to identify relevant analogous cases:

- The distinction between specific and general subsequent developments;

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[34] See Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, New York, 2000, p. 192.

[35] See *Kasikili/Sedudu Island*, 49-50; *Air Services Arbitration (US v. France)*: Award of Appellate Body Report on *Japan-Alcoholic Beverages* (1 November 1996) WT/DS8; WT/DS10; WT/DS11, p. 13; Giovanni, Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. XL (1994), p. 41 et seq., 46 et seq.

[36] *Humphrey Waldock*, Sixth Report on the Law of Treaties, *Yearbook ... 1966*, vol. II, A/CN.4/186, p. 99, para. 18; see also *Giovanni Distefano*, *supra* note 30, p. 55.

[37] See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12 October 1984, *I.C.J. Reports 1984*, 246, para. 130; *Temple of Preah Vihear*; *ibid.*, (separate opinion of Judge Alfaro) pp. 39, 40; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment of 20 February 1969, *I.C.J. Reports 1969*, 4, para. 30; Ian Brownlie, *Principles of Public International Law*, 6th ed., (Oxford University Press), 2003, p. 616; see also Phil C.W. Chan, "Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited", *Chinese Journal of International Law*, vol. 3 (2004), pp. 421-439, 439; Hans Das, "L'Estoppel et l'Acquiescement: Assimilations Pragmatiques et Divergences Conceptuelles", *Revue Belge de Droit International*, vol. 30 (1997), pp. 607-634, at p. 608; Malcom N. Shaw, *International Law*, 5th ed., Cambridge University Press, Cambridge 2003, p. 439; Martti Koskenniemi, *From Apology to Utopia - The Structure of International Legal Argument*, Reissue, Cambridge 2005, pp. 356 et seq.

- The distinction between technical treaties and more general treaties, such as treaties concerning the ensuring of security and/or human rights;

- The distinction between treaties with or without a special judicial dispute resolution mechanism;

- The distinction between old and new treaties;

- The distinction between bilateral and multilateral treaties.

(c) Relevant actors or activities

27. The question as to which of its organs is entitled to represent the State on the international level is known from a variety of settings. Article 7 VCLT is obviously too narrow when it comes to determining the range of state organs or other actors that are capable of contributing to relevant subsequent agreement or practice. On the other hand, the all-inclusive approach of the rules on State responsibility[38] is probably too broad for this purpose. The arbitral award in the case of the *Tax regime governing pensions paid to retired UNESCO officials residing in France* was reluctant to consider the conduct of low-ranking state organs as evidence of subsequent practice to a treaty.[39] Other awards have, however, relied on such practice, albeit only when it occurred with the tacit consent of higher authorities.[40] A study could provide a systematic analysis of whose action can count for subsequent agreement or practice.

(d) Constituent elements

28. The view is still widely held that all parties to a treaty should contribute to the subsequent practice in question. However, subsequent practice is also sometimes compared to being structurally similar to the development of new customary rules. There, the principle according to

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[38] See Article 4, Draft Articles on State Responsibility, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

[39] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France (France v. UNESCO)*, Award of 14 January 2003, UNRIAA, vol. XXV, pp. 231-266, 258, para. 70; on this award see Robert Kolb, "La modification d'un traité par la pratique subséquente des parties", *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, vol. 14 (1) (2004), pp. 9-32.

[40] *Air Services Arbitration (US-France).*

which all States need to consent to customary rules has been subject to certain modifications.[41] However, one important difference between customary law and treaty law lies in the fact that treaty law more clearly rests on the consent of all parties.

29. It is, however, a matter of considerable debate how such consent should be established. Examples from international practice include a WTO Panel Report which determined that the practice of only one party could shed light on the meaning of a provision as long as it was the practice of the sole State concerned with the question at issue.[42] Although the panel was later overruled in this regard by the Appellate Body,[43] the panel report merits attention and has merely reiterated a problem that has arisen in other contexts as well.[44] The ICJ has recognized that the practice of one individual State may have special cogency when it is related to the performance of an obligation incumbent on that State.[45]

(e) Substantive limits

30. The study would also need to look into possible limits for the consideration of subsequent agreement and subsequent practice. Some treaties contain specific rules concerning their interpretation and which can affect the operation of general methods of interpretation (see below sub (g) = "Special types of treaties"). However, substantive limits could also flow from rules of *jus cogens*. Such rules could pose a limit to certain forms of evolutive treaty interpretation by the parties, but they may also themselves be specifically affected by subsequent developments (see article 64 VCLT).

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[41] See Christian Tomuschat, "Obligations Arising for States Without or Against their Will", *Recueil des Cours ...* vol. 241 (1993-IV), pp. 195-374, 290.

[42] *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, para. 7.255.

[43] Panel Report, European Communities - Customs Classification of Frozen Boneless Chicken Cuts (30 May 2005) WT/DS269/R, para. 259.

[44] C.F. Amerasinghe, Principles of the Institutional Law of International Organizations, Cambridge, 2nd ed. 2005, at pp. 50 seq.

[45] *Legal Status of South-West Africa*, Advisory Opinion of 11 July 1950, *I.C.J. Reports 1950*, p. 128, 135 et seq.; Lord McNair, *The Law of Treaties*, 2nd rev. (Stevens and Sons, London, 1961), p. 427.

(f) Treaty modification and informal cooperation

31. While it may be exaggerated to pretend, as Georges Scelle has done, that "l'application elle-même des traités n'est (…) qu'une révision continue",[46] a study on subsequent agreement and subsequent practice must consider informal treaty application as forms of interpretation and possibly even of treaty modification.[47] A classical example for the case in which supposed interpretation may have turned into a modification of a treaty is the understanding of the ICJ of Article 27 (3) of the United Nations Charter with respect to the non-consideration of abstentions of permanent members of the Security Council.[48] Although the possibility of treaty modification was also acknowledged by arbitral awards,[49] the ICJ has recently adopted a more sceptical position in this regard and did not find a modification through subsequent practice in the *Kasikili/Sedudu Island Case*.[50]

32. The issue of modification is connected with a tendency of States to resort to informal means of international cooperation. One question concerns the value of "memorandums of understanding" in the context of subsequent practice.[51] Their legal force is contested. However, uncertainty surrounding their status has not prevented arbitral tribunals from considering them as subsequent practice.[52]

(g) Special types of treaties

33. The study should also consider subsequent agreement and subsequent practice within special treaty regimes. While the Study Group Report on Fragmentation has rejected the notion

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[46] Georges Scelle, *Théorie juridique de la révision des traités*, Paris (Librairie du Recueil Sirey) 1936, p. 11.

[47] Karol Wolfke, "Treaties and Custom", in: Jan Klabbers (ed.), Essays on the Law of Treaties - A Collection of Essays in Honour of Bert Vierdag", (1998), pp. 31-39, 34.

[48] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16, 21-22.

[49] See *Taba Arbitration (Egypt v. Israel)*, Award of 29 September 1988, UNRIAA XX, pp. 1-118, at 56-7, paras. 209-211; *Temple of Preah Vihear*; *Air Services Arbitration (US-France)*; *Delimitation of the Border (Eritrea v. Ethiopia)*, pp. 110 et seq.; Anthony Aust, *Modern Treaty Law and Practice*, p. 213.

[50] *Kasikili/Sedudu Island (Botswana v. Namibia)*.

[51] Aust, *Modern Treaty Law and Practice*, pp. 26-45.

[52] *Arbitration Concerning Heathrow Airport User Charges (United States v. United Kingdom)*, Award of 30 November 1992, UNRIAA, vol. XXIV, pp. 1-359, 76 et seq., 130 et seq.

of "self-contained regimes",[53] it is nevertheless necessary to study how the general rules are applied in special contexts. One example is provided by WTO law. The interpreter of WTO law is faced with a complex array of provisions that simultaneously provide for and limit recourse to the interpretation of WTO law through subsequent practice. It follows that the considerable amount of reports both by Panels and the Appellate Body, which explicitly deal with subsequent practice, must be read in light of this framework of rules.[54]

34. Certain other treaty regimes that establish judicial organs or provide for some form of institutionalized dispute settlement display a tendency to develop their own rules of interpretation which differ from the classical canons of general international law. One example is the European Community/European Union Legal System, in which subsequent practice is regularly not included in the list of means of interpretation of the (European) Court of Justice.[55] On the other hand, in the context of the Common Foreign and Security Policy under the Treaty Establishing the European Union (TEU), subsequent practice of the organization as a means to interpret the relevant provisions of the TEU, such as Article 24,[56] is still plausible.

35. The European Convention on Human Rights is another special case. Although references to subsequent developments are numerous in the jurisprudence of the European Court of Human Rights,[57] it merits attention how the Court actually makes use of it. Apart from the classical practice of the member States themselves, the concept of the Convention as a "living instrument" could be considered as subsequent practice of the civil society more than as subsequent practice of the States party to the Convention.[58]

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[53] Fragmentation Report, paras. 191 et seq.

[54] See the references in (footnote 9 above).

[55] See Case 68/86 *United Kingdom v. Council* [1988] ECR 855, para. 24.

[56] See *Daniel Thym*, "Die völkerrechtlichen Verträge der Europäischen Union", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 66 (2006), pp. 863 et seq., at p. 870.

[57] See the references in *supra* note 7.

[58] Rudolf, Bernhardt, "Interpretation in International Law, *in* (ed.), *Encyclopedia of Public International Law*, vol. II (1995), pp. 1416-1426, 1421.

(h) Customary international law and systemic integration

36. The means of interpretation provided for in article 31 (3) VCLT invite closer inspection as to their relation to the development of new customary rules.[59] Subsequent practice may reflect the wish of States to see a treaty modified in order to adapt it to the changing normative environment. From this perspective, subsequent practice in the sense of article 31 (3) (b) VCLT is intimately connected to the principle of systemic integration as embodied in lit. c of the same paragraph.

E. How to approach the topic of subsequent agreement and practice

37. The object of the proposal is to develop guidelines for the interpretation of treaties in time on the basis of a repertory of practice. The goal is to deal with the topic within one quinquennium.

38. The nature of the topic as a cross-cutting issue requires an approach that is different from the one to be adopted if the goal would be to codify a specific area of international law. It would not make sense, for example, to start with general principles and then move to more specific guidelines or exceptions. This is because the material from which the guidelines would be extracted is substantially less pre-formed as are subject-areas which lend themselves to codification. It is therefore necessary to develop the repertory and the ensuing guidelines inductively from certain manageable categories of material. These categories should fulfil two requirements: first, it should be possible to rather clearly delineate them from each other and, second, it should be possible deal with them in a sequence which avoids duplication of work as far as possible.

39. The following categories of material should fulfil these requirements if analysed one after the other:

(a) Jurisprudence of international courts and tribunals of general and *ad hoc* jurisdiction (e.g. ICJ, Arbitral Tribunals);

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[59] See Maurice Kamto, "La volonté de l'État en droit international", *Recueil des Cours* ... vol. 310 (2004), pp. 133 et seq.

(b) Pronouncements of courts or other independent bodies under special regimes (e.g. WTO, DSU, ECHR);

(c) Subsequent agreement and practice of States outside of judicial or quasi-judicial proceedings;

(d) Subsequent agreement and practice with respect to and by international organizations (United Nations, Specialized and Regional Organisations);

(e) Jurisprudence of national courts;

(f) Conclusions.

40. From a purely theoretical point of view the point of departure should, in principle, be the practice of States outside of judicial or quasi-judicial proceedings. Practical considerations, however, militate in favour of the suggested sequence. The collection of the practice of States outside of judicial or quasi-judicial proceedings is the most difficult part of the project and it requires, more than any other category of material, help from States and other sources. There should be time for the preparation of this aspect of the topic by the Commission, and in particular for States to respond to a questionnaire. Since the legal significance of subsequent agreement and practice is usually described by way of examples from the jurisprudence of international courts it is probably better to start the analysis of the topic by reviewing the jurisprudence of international courts of general jurisdiction (in particular the ICJ) and of ad hoc jurisdiction (various arbitral tribunals). These judicial bodies have developed the main reference points from which an analysis can proceed. The analysis of the pronouncements of courts or of other independent bodies under special regimes would follow and supplement the previous analysis by either confirming the approach of the international courts or tribunals of general or ad hoc jurisdiction, or by suggesting that certain exceptions exist in special regimes.

41. After reviewing the international judicial or quasi-judicial bodies' reflection of subsequent agreement and practice of States pertinent examples of such agreement and practice of States outside of judicial or quasi-judicial proceedings should be addressed. In this context, the question must again be asked whether such practice of States generally confirms the jurisprudence of international judicial or quasi-judicial bodies, and whether it adds any considerations.

42. The analysis of the international pronouncements on the topic would be completed by looking at subsequent agreement and practice with respect to and by international organizations. It is expected that certain specific understandings and practices will emerge in this context which could then become the basis for corresponding guidelines. A review of the available jurisprudence of national courts will help confirm or call into question previous insights.

43. Ultimately, a final report should synthesize the different layers of analysis and conclude with the envisaged guidelines to interpretation.

44. The suggested way of how to proceed with this cross-cutting issue inevitably raises questions of delimitation which must be resolved as the work on the topic proceeds. Another question is how to integrate the views of authors. It is suggested that they be considered depending of how specifically they relate to the subcategory of material under consideration. This means that general views of authors on the issue of treaty interpretation in time would be considered mainly at the beginning and near the end of the work on the topic.

F. Conclusion

45. There are many examples of subsequent agreement and subsequent practice to international treaties. In a statement to the Sixth Committee in October 2007, one State has confirmed and substantiated the practical interest of States to improve their knowledge how subsequent agreements and subsequent agreement and practice may influence interpretation of their treaty obligations.[60] It is true that the topic implicates many subject areas, as another State has remarked in its statement to the Sixth Committee,[61] but this does not mean that the topic is not sufficiently concrete and suitable for progressive development. As a cross-cutting issue, the topic proceeds from a firm basis in practical cases to which it gives added value by way of comparative analysis. The "real world issues"[62] which suggest that the Commission take on this

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[60] Statement by Germany on 30 October 2007, p. 5.

[61] Statement by the United States on 31 October 2007, p. 4.

[62] Statement by the United States on 31 October 2007, p. 5.

topic at this time are coming up more and more frequently, as is demonstrated by the recent *Medellin v. Texas* decision of the United States Supreme Court and its analysis of the "post-ratification understanding" of the Vienna Convention on Consular Relations.[63]

46. It is therefore suggested that the Commission shed light on the necessary balance between stability and change in the law of treaties through the codification and progressive development of international law on the matter. The topic lends itself both to the traditional method of being elaborated on the basis of reports by a Special Rapporteur, as well as to the method of being treated by a Study Group.

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[63] *Medellin v. Texas*, Judgment of 25 March 2008, 552 U.S. ... (2008) (Slip opinion at pp. 20-21).

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Annex B

The Most-Favoured-Nation clause

(Working Group of the Commission)

1. In 1978, the Commission adopted draft articles on the topic of the Most-Favoured-Nation (MFN) clause. No action was taken on them by the General Assembly. In 2006, at the fifty-eighth session of the ILC, the long-term Working Group discussed whether the MFN clause should be considered again and to include the topic in its long-term programme of work but the Commission did not make any decision on the matter. The Commission then invited the views of governments. At the sixty-first session of the Sixth Committee, one State supported the idea but two States expressed doubts about the wisdom of taking on the topic. The Commission has now established a working group to consider whether or not the topic of the MFN clause should be included in its long-term programme of work.

2. This paper reviews the MFN clause issue; what was decided in 1978, why it was not taken any further, what has changed since 1978, and whether there is something that the Commission could usefully do on this subject.

1. The nature, origins and development of MFN clauses

3. An MFN clause is a provision in a treaty under which a State agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third States. It was an early and particular form of a non-discrimination clause and its origins date back to early treaties of friendship, commerce and navigation ("FCN treaties"). For example, a 1654 treaty between Great Britain and Sweden[1] provided:

> The people, subjects and inhabitants of both confederates shall have, and enjoy in each other's kingdoms, countries, lands, and dominions, as large and ample privileges, relations, liberties and immunities, as any other foreigner at present doth and hereafter shall enjoy.

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[1] *Treaty of Peace and Commerce between Great Britain and Sweden*, 11 April 1654, BSP 1/691.

Such a clause guaranteed only treatment that was as good as other foreigners were to receive. It was not a guarantee of national treatment. Nationals might receive better or worse treatment than foreigners. Thus, an MFN clause was not a comprehensive non-discrimination provision.

4. As the Great Britain/Sweden agreement shows, the grant of MFN treatment was for the benefit of the "people, subjects and inhabitants" of both States. This was typical of FCN treaties. They were primarily, although not exclusively, about economic activities. The benefits being granted under these agreements were designed to facilitate the economic activities of the subjects of each State within the territory of the other State. Indeed, the rationale for granting MFN treatment was economic - the desire by the recipient of MFN treatment to avoid its own subjects from being economically disadvantaged by comparison with the subjects of third States. It was not based on any notion of the equality of States.

5. However, MFN treatment was not solely limited to the economic sphere. Bilateral treaties relating to diplomatic and consular relations also included MFN guarantees, both in respect of the ability to maintain diplomatic and consular premises and in respect of the privileges granted to diplomatic and consular personnel.[2] Once diplomatic and consular relations were regulated by multilateral conventions establishing rights across the board, there was no need for bilateral agreements preventing discrimination through the inclusion of an MFN clause.

6. Outside the economic sphere, MFN was a principle of non-discrimination suited to circumstances where relations between States were regulated through bilateral arrangements. Such clauses had less utility where relations were regulated under multilateral agreements and MFN could be covered by a general non-discrimination provision. However, MFN has retained its pre-eminence in the economic sphere, where multilateral agreements have included MFN provisions. This reflects the economic objective of MFN in this area, something that is not captured by a general non-discrimination provision.

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[2] See for example the Italo-Turkish Consular Convention of 9 September 1929, 129 L.N.T.S. 195, cited in "First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur" (UN doc. A/CN.4/213), in *Yearbook ... 1969*, vol. 2, 166 at para. 57 (A/CN.4/SER.A/1969/Add.1).

7. In the economic field in the nineteenth and early twentieth centuries, MFN was often granted conditionally. Instead of granting MFN treatment automatically, a State would grant MFN treatment in exchange for a benefit provided by the other State. In other words, the grant of MFN treatment had to be paid for. This was known as "conditional MFN". The granting of conditional MFN declined with greater realization that there were economic benefits to the granting State from granting MFN unconditionally and conditional MFN has little significance today.

8. Unconditional MFN became the cornerstone of the GATT regime. Under article I of GATT, MFN was to be granted at the border to the goods of other GATT Contracting Parties "immediately and unconditionally". Together with the requirement of GATT article III to provide "national treatment" to those goods once they had entered the domestic market of a GATT Contracting Party, the MFN principle became the core of the principle of non-discrimination under GATT, and this has continued under the WTO. Indeed, under the WTO agreements MFN has been extended beyond its specific application to goods and applied to the area of services and the protection of intellectual property rights. Article II of the General Agreement on Trade in Services (GATS) provides for a very broad application of MFN in respect of "any measure covered by this Agreement".

9. Notwithstanding the centrality of MFN treatment under GATT article I, the GATT and the WTO also provide important exceptions to MFN treatment. The principal exception is in respect of regional arrangements - customs unions and free trade areas - which grant preferences to the members of those agreements and hence are not providing MFN treatment to all GATT contracting parties. In accordance with GATT article XXIV, these benefits do not have to be extended to other GATT Contracting Parties or WTO Members.

10. The continuation of MFN under the regime of the WTO with its own dispute settlement process has meant that within the WTO trading regime there is an opportunity for the requirement of MFN treatment to be interpreted in a consistent way. However, MFN has been given a new lease of life with the inclusion of regional trade agreements and the explosion in the conclusion of bilateral investment agreements, all usually including some form of MFN requirement.

2. The prior work of the ILC on the MFN clause

11. The ILC's treatment of MFN clauses arose out of its work on the law of treaties. It had been proposed that a provision be included in the draft articles on the law of treaties excluding their application in the case of MFN clauses. The Commission decided not to do that but to look at MFN clauses as a separate topic.[3] The Special Rapporteur, Mr. Endre Ustor, and his successor Mr. Nikolai Ushakov, conducted exhaustive analyses of MFN clauses as they existed up until the mid-1970s. Their reports were based on considerable State practice in the conclusion of treaties that included MFN clauses in a variety of areas, decisions of the ICJ that touched on MFN clauses (*Anglo-Iranian* case,[4] *Case concerning right of nationals of the United States of America in Morocco*,[5] *Ambatielos* case[6]) the *Ambatielos Arbitration*[7] and a considerable body of decisions of national courts.

12. The approach of the Commission was to study the MFN clause and MFN treatment "as a legal institution"[8] and not simply as a matter of the law of treaties, and to look at the operation of the clause broadly and not be limited to the field of international trade. It sought to avoid trying to resolve matters of a "technical economic nature".[9]

13. The 30 draft articles produced by the Commission covered such matters as the definition of the MFN clause and MFN treatment (draft articles 4 and 5), its scope, the conventional rather than customary international law basis of MFN treatment (draft article 7), the scope of MFN treatment (draft articles 8, 9 and 10), the effect of conditional and unconditional MFN (draft articles 11, 12 and 13), the source of the treatment to be provided under an MFN clause (draft articles 14-19), the time that rights arise under an MFN clause (draft article 20), termination or

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[3] Report of the Commission to the General Assembly on the work of its thirtieth session (UN doc. A/33/10), in *Yearbook ... 1978*, vol. 2 (Part 2), 8 at para. 15 (A/CN.4/SER.A/1978/Add.l (Part 2)).

[4] *Anglo-Iranian Oil Co. (United Kingdom v. Iran), I.C.J. Reports 1952*, p. 93.

[5] *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America), I.C.J. Reports 1952*, p. 176.

[6] *Ambatielos Case (Greece v. United Kingdom)* [1952], *I.C.J. Reports 1952*, p.28.

[7] *Ambatielos Arbitration* (United Kingdom-Greece), UNRIAA, vol. XII (1956), at p. 83.

[8] *Yearbook* ... (footnote 3 above) at para. 61.

[9] *Ibid.*, at para. 62.

suspension of an MFN clause (draft article 21), and the relationship of the MFN clause to a generalized system of preferences (draft articles 23 and 24), and the special cases of frontier traffic and transit rights of land-locked States.

3. The reaction of the Sixth Committee to the draft articles

14. The draft articles on MFN were never taken any further by the General Assembly. The debate in the Sixth Committee[10] indicates several concerns about the draft articles but two matters were prominent. First, there were concerns that the draft articles did not exclude customs unions and free trade areas. This was a particular issue for EEC members, which did not want to see the benefits under the Treaty of Rome being extended through MFN to States that were not EEC members. They would have preferred excluding customs unions and free trade areas from the draft articles. Developing countries that were entering into regional free trade agreements voiced similar concerns.

15. Second, there were concerns over the treatment of the issue of development in the draft articles, including the treatment of generalized systems of preferences. For some, the draft articles did not treat the issue of preferences for developing countries adequately; for others the draft articles were straying into the debate over the New International Economic Order. The combination of these and other concerns meant that there was no constituency in the General Assembly for turning the draft articles into a convention. For some States, the draft articles should simply be seen as guidelines.

4. Developments since 1978

16. The circumstances that existed when the Commission dealt with the MFN clause in its reports and final draft articles of 1978 have changed significantly.

> First, several of the bilateral arrangements on which the Special Rapporteurs relied to demonstrate State practice in relation to MFN provisions have been superseded by multilateral arrangements. The consequence is that MFN today is more focused in the economic area.

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[10] C6, 33rd Session, UN doc. A/C.6/33/SR.27-45 (1978). The topic was raised in the Sixth Committee from 1980 until 1983, in 1988 and 1989 and again in 1991.

Second, the GATT, which was a principal source for considering MFN, has now been subsumed within the WTO. This has had the result of broadening the ambit of MFN to areas beyond goods, to services and to intellectual property. In addition, the WTO dispute settlement system with its appellate process has provided an opportunity for the MFN provisions in the WTO agreements to be subject to authoritative interpretation.

Third, there has been a vast increase in the negotiation of free trade agreements on a bilateral and regional basis and of bilateral investment agreements that include MFN provisions.

Fourth, resort to dispute settlement under investment agreements through the procedures of the International Centre for the Settlement of Investment Disputes (ICSID) or the UNCITRAL Arbitration Rules has resulted in the interpretation of MFN provisions in the investment context.

17. These developments all have implications for the way MFN clauses are to be viewed today and for the contemporary relevance of the draft articles produced by the Commission in 1978. There is now a substantial new body of practice to be taken into account in assessing how MFN clauses are being used and how they operate in practice. The relationship between the general MFN obligation in GATT article I and the power of States to grant preferential treatment to developing countries has been discussed specifically by the WTO Appellate Body.[11]

18. Practice relating to MFN clauses is also taking place in a context that is different from that which existed when the Commission last considered the MFN clause. The 1978 draft articles relied heavily on the Charter of Economic Rights and Duties of States when considering the relationship of the MFN clause to the question of preferential treatment for developing States. The debate on preferential treatment for developing countries in the field of trade takes place now within the framework of the WTO whose membership is increasingly becoming universal, and in particular within the context of the Doha Development Round of multilateral trade negotiations.

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[11] *EC-Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), WTO doc. WT/DS246/AB/R (Appellate Body Report).

19. In the field of investment agreements the nature and scope of MFN provisions has particularly come to the fore. The scope accorded to certain MFN provisions and the differing approaches taken by various investment tribunals has created what is perhaps the greatest challenge in respect of MFN provisions. This, too, is a body of jurisprudence that was not available to the Commission at the time of its earlier work.

20. In a global environment of economic liberalization and deeper economic integration, the MFN clause continues to be a critical factor in international economic relations among member States. The continuing relevance of the MFN clause could perhaps be viewed in the context of two phases. In the first phase, the growth of Bilateral Investment Promotion and Protection Agreements (BITs) in the 1990s underlined the continuing importance of the MFN clause which along with other provisions ensured international minimum standards of treatment for foreign investors and their investments. In the second phase, the emergence of Free Trade and Comprehensive Economic Partnership Agreements which provide for the liberalization of trade in goods and services and the treatment of investment in an integrated manner, with close cross-linkages between services and investment sectors has brought to surface new issues with regard to the application of the MFN Clause.

21. The according of MFN treatment for investment even at the pre-establishment stage, is a feature in the Free Trade Agreements, which was not common in Investment Promotion and Protection Agreements in the past, where MFN treatment was limited to the post-establishment phase. The conclusion of these Free Trade Agreements and Comprehensive Economic Partnership Agreements, with substantive chapters on foreign investment, marks a new phase in the importance of the MFN clause in the contemporary economic relations among States. A review of the role of the MFN clause in the context of these new economic integration agreements merits closer study from a legal perspective.

5. The challenges of the MFN clause today

22. An exhaustive study of the practice of including MFN provisions in treaties would no doubt shed new light on the way that clause is operating and being applied by States. This may yield new insights about MFN. However, in the field of investment specific problems have arisen with the application of MFN clauses that may have implications for the application of MFN in other contexts as well.

23. The issue arose in *Maffezini v. Kingdom of Spain.*[12] The claimant, Maffezini, an Argentine national, had brought a claim under the bilateral investment agreement between Argentina and Spain. Spain argued that in accordance with article X (3) of that agreement Maffezini had to submit the case to the domestic courts in Spain for a period of 18 months before bringing a claim under the provisions of the agreement. However, the claimant pointed to the MFN provision in the Argentine-Spain investment agreement (art. 4), which provided:

> In all matters subject to this Agreement, this treatment shall be not less favourable than that extended by each Party to the investments made in its territory by investors of a third country.

The claimant was then able to show that under the Spain-Chile bilateral investment agreement, investors bringing a claim under that agreement did not have to first submit their claims to domestic Spanish courts. By comparison, then, the Argentine investor was being treated less favourably than Chilean investors in Spain. Thus, by virtue of the MFN clause in the Argentine-Spain agreement the claimant said, it was entitled to the more favourable treatment that Chilean investors receive under the Spain-Chile bilateral investment agreement. As a result, it argued, its failure to commence a claim on the Spanish courts was not a barrier to bringing a claim under the Argentine-Spain investment agreement.

24. The tribunal rejected Spain's argument that the MFN clause in the Argentine-Spain bilateral investment agreement applied only to substantive and not procedural provisions, pointing out that by its very terms the MFN clause applied to "all matters subject to this Agreement". After a review of prior international jurisprudence and Spanish treaty practice, the tribunal concluded that the claimant could use the MFN clause in the Argentine-Spain bilateral investment treaty to claim the better treatment provided in the Spain-Chile investment agreement and thereby avoid the obligation of having to submit its claim to the domestic courts of Spain.

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[12] *Maffezini v. Kingdom of Spain*, 25 January 2000, ICSID Case No. ARB97/7.

25. Subsequent ICSID tribunals have both followed[13] and distinguished[14] the *Maffezini* decision, although it is not clear that any consistent interpretation of MFN provisions has emerged. The *Maffezini* decision opens the possibility that MFN clauses could have an extremely broad scope. An MFN clause has the potential for becoming a "super-treaty" provision, which would allow beneficiary States simply to pick and choose from amongst the benefits that third States receive from the other contracting party - what has been referred to as "treaty-shopping". The members of the tribunal in *Maffezini* saw potential problems with their decision and sought to limit its scope with a number of exceptions. But the principle on which those exceptions are based is not made clear in the decision nor is it clear whether such exceptions are exclusive.

26. The problem for States arising out of the *Maffezini* decision is whether they can determine in advance with any certainty what obligation they have in fact undertaken when they include an MFN clause in an investment agreement. Are they granting broad rights, or are the rights they are granting more circumscribed. The 1978 draft articles provide limited guidance on the question. Under draft article 9, a beneficiary State acquires under an MFN clause "only those rights which fall within the subject matter of the clause". But, determining the subject matter of the clause is the very question with which the *Maffezini* and other tribunals have been grappling.

27. There are further dimensions to the question of the scope of an MFN provision, in particular its relationship to other provisions in investment agreements, such as those relating to national treatment and "fair and equitable treatment". Some investment tribunals have taken the view that an MFN clause justifies reference to other investment agreements to establish what constitutes "fair and equitable treatment".[15] This, too, has led to uncertainty in the scope of an MFN clause.

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[13] *Siemens A.G. v. Argentine Republic*, 3 August 2004, ICSID Case No. ARB/02/8.

[14] See for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, 9 November 2004, ICSID Case No. ARB/02/13.

[15] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, 25 May 2004, ICSID Case No. ARB/01/7; *Pope & Talbot, Inc. v. Canada*, Award of the NAFTA Tribunal, 10 April 2001, I.L.R. vol. 122, (200), p. 352.

28. *Maffezini* has resulted in States trying to craft MFN clauses that will not have broad-ranging consequences. Distinctions between substantive and procedural provisions, the exclusion of dispute settlement from MFN, and the limitation of MFN to specified benefits have found their way into various agreements. The problem is that States cannot be certain how these new clauses will be interpreted in fact.

29. At one level the problem is simply a matter of treaty interpretation. MFN clauses are worded differently in different agreements. Some are broad in scope and others are narrow. Some limit MFN treatment to those in "like circumstances". The function of the interpreter therefore is to define the precise scope of the clause in question. Under this approach the problem can be resolved through interpretation. But, at another level the question is more fundamental. Treaty interpretation does not take place in a vacuum. How an interpreter approaches an MFN clause will depend in part on how the interpreter views the nature of MFN clauses.

30. If MFN clauses are seen as having the objective of promoting non-discrimination and harmonization, then a treaty interpreter may consider that the very purpose of the clause is to permit and indeed encourage treaty shopping. An interpreter who sees an MFN clause as having the economic purpose of allowing competition to proceed on the basis of equality of opportunity, might be more inclined to favour a substantive/procedural distinction in the interpretation of an MFN provision. In this regard, the experience of the interpretation of the MFN clause in the WTO context and in other areas may provide guidance for the interpretation of MFN in the context of investment agreements.

6. What could the ILC usefully do?

31. It is clear that circumstances have changed significantly since the 1978 draft articles on MFN clauses. There is now a body of practice and jurisprudence that was not available at that time. There is also a problem that has emerged with the application of MFN clauses in investment agreements resulting in a need by States for clarification and perhaps progressive development of the law in this area.

32. The argument that the underlying problems that led the General Assembly not to proceed to a convention with the 1978 draft articles remain today would only be compelling if it was proposed that the Commission undertake to update and revise the 1978 draft articles. There are

existing forums for dealing with the issues that caused concern with those draft articles. As far as the issue of generalized systems of preferences and the broader question of development are concerned, they are matters being dealt with in the context of the WTO and the Doha Development Round. As far as the issue of customs unions and free trade areas are concerned, they, too, are being dealt with within the framework of the WTO agreements. There is no reason for the Commission to seek to consider undertaking a codification or progressive development exercise in respect of a regime that is developing under the framework of GATT article XXIV and the decisions of WTO panels and the Appellate Body.

33. The issue today with respect to MFN clauses is different from the issues that created concerns with the 1978 draft articles. It has arisen specifically in the context of investment agreements, but it may be of broader application. The real question, given the nature of the problem that currently exists, is whether there is anything that the ILC as the United Nations organ concerned with the progressive development of international law and its codification can usefully do.

34. This is not to suggest that the issue is one that is narrow and technical properly falling within the purview of some other body. It is not. The fundamental questions about MFN clauses are matters of public international law. The central issue is how should MFN clauses be interpreted. And while this may appear to be a narrow question, in reality it is a broad question involving both treaty interpretation and the nature and extent of obligations undertaken by States under the ambit of an MFN clause. It engages our understanding of the role and function of MFN clauses and of their relationship to the principle of non-discrimination in international law.

35. Other bodies have also been focusing on this topic. OECD has produced a study on MFN clauses,[16] as has UNCTAD.[17] Equally, the subject is being explored in the academic literature. This does not mean that the field is already fully occupied.

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[16] OECD, Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, Working Papers on International Investment, Working Paper No. 2004/2 (2004). Online: <http://www.oecd.org/dataoecd/21/37/33773085.pdf>.

[17] United Nations Conference on Trade and Development (UNCTAD). "Most-Favoured-Nation Treatment" (1999). UNCTAD Series on issues in international investment agreements. UN doc. UNCTAD/ITE/IIT/10 (vol. III).

36. The contrary view, taken by some Governments, is that MFN clauses are varied and do not easily fit into general categories. Governments are able to craft clauses that suit their needs and thus there is no need for any general consideration of the subject. The problems that have arisen can be dealt with on a case-by-case basis and thus it is appropriate to let the jurisprudence on the interpretation of MFN clauses develop as it has been doing. On this analysis there would be no role for the Commission on this topic.

37. Those who support work by the Commission in this area consider that what it could usefully do in this area is provide authoritative guidance on the interpretation of MFN clauses. This would require an exhaustive analysis of the development of the nature, scope and underlying rationale for MFN clauses, the existing MFN jurisprudence in the various contemporary areas in which the MFN clause operates today, the variety and uses of MFN clauses in contemporary practice, and how MFN clauses have been interpreted and how they should be interpreted.

38. The result of the Commission's work could be draft articles or draft guidelines relating to the interpretation of MFN clauses or it could be a series of developing model MFN clauses or categories of clauses with commentaries on their interpretation. Either outcome could provide guidance to States in their negotiation of agreements with MFN clauses and to arbitrators interpreting investment agreements.

39. The interpretation of MFN clauses is a topic that responds to the needs of States and practice is sufficiently developed to permit some progressive development and possibly codification in this area. The topic has a defined scope and could be completed within the current quinquennium.

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